SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 26

THE UNITED STATES OF AMERICA, PETITIONER

vs.

WESTINGHOUSE ELECTRIC & MANUFACTURING CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

INDEX

1 In United States Circuit Court of Appeals for the First Circuit

October Term, 1947

No. 4353

UNITED STATES OF AMERICA, PETITIONER, APPELLANT

v.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, APPELLEE

In United States District Court, District of Massachusetts

No. 6669 Misc. Civil.

UNITED STATES, PETITIONER

v.

TWO PARCELS OF LAND, SITUATED IN THE CITY OF SPRINGFIELD, COUNTY OF HAMPDEN, COMMONWEALTH OF MASSACHUSETTS, AND HODGES CARPET COMPANY, ET AL., RESPONDENTS

Appeal of the United States, Petitioner from Judgment as to Parcel "A"

[Entered November 24, 1947]

Petition for condemnation

Filed February 18, 1943

[Memorandum: The schedules attached to Petition for Condemnation are here omitted in accordance with Designation. John A. Canavan, Clerk.]

2 Comes now the United States of America, represented herein by Edmund J. Brandon, United States Attorney in and for the District of Massachusetts, and Philip P. A. O'Connell, Special Assistant to the United States Attorney in and for the said District, acting under instructions of the Attorney General of the United States and at the request of the Secretary of War of the United States, and respectfully represents to the Court as follows:

(1) That pursuant to the provisions contained in the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 518; 50 U. S. C. sec. 171); the Act of Congress approved March 27, 1942, Second War Powers Acts, Public Law 507—77th Congress, Second Session, and the Act of

Congress approved July 2, 1942 (Public Law 649—77th Congress) and all other Acts or parts of Acts amendatory thereof or supplementary thereto, the Secretary of War of the United States of America has been authorized and empowered to acquire by condemnation the land hereinafter described for use in connection with storage facilities and for other related military purposes in that part of Springfield known as Indian Orchard, Massachusetts;

(2) That this proceeding is instituted by direction of the Attorney General of the United States at the request of the Secretary of War of the United States.

(3) That the interest to be acquired is a term for years ending June 30, 1943, subject to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, said term being renewable for additional yearly periods during the existing national emergency at the election of the Secretary of War, which election shall be signified by the giving of notice at any time prior to the expiration of the term hereby taken or subsequent extensions thereof;

(4) That for use in connection with the aforesaid purposes, the Secretary of War of the United States of America has determined it is necessary and advantageous to the United States of America to acquire the lands or interests therein and all improvements thereon and all rights thereunto appertaining by condemnation under judicial process; and all preliminary and administrative steps required by law have been taken;

(5) That the lands or interests therein sought to be condemned are shown on a plan marked Schedule "B" and more particularly described in Schedule "A", both of which are attached hereto and made a part hereof;

(6) That according to the land records of the County of Hampden and other evidence presently available to your petitioner, it appears that title to the lands hereinafter described together with all improvements therein, is now vested in those persons, firms or corporations set out in Schedule "C", attached hereto and made a part hereof;

(7) That in addition to the persons named, there are or may be other persons, firms or corporations, whose names are unknown to petitioner who have or who may claim to have some interest in the property hereinafter described or who may claim to be entitled to compensation with respect to the taking thereof, and petitioner, therefore, makes parties defendant hereto all persons, firms and corporations, known and unknown, who have, or who may claim to have any right, title, interest or estate in, or lien, encumbrance, servitude, easement, demand or claim on or in respect of the hereinafter described premises;

(8) The attorneys for the petitioner herein further re-
4 spectfully represent to the Court that the Secretary of War of the United States of America has determined that it is necessary to take immediate possession of certain real property herein described; that under the provisions of the Act of Congress approved March 27, 1942 (Public Law 507—77th Congress) and all other Acts or parts of Acts amendatory thereof or supplementary thereto, the United States of America has the right to take immediate possession of any lands, easements or rights of way needed for use in connection with the aforesaid purposes duly authorized by Congress to the extent of the interest to be acquired by the United States, and proceed with such military purposes thereon as have been authorized by Congress, PROVIDED, however, that certain and adequate provision shall have been made for the payment of just compensation to the party or parties entitled thereto, either by previous appropriation by the United States of America or by the deposit of monies or other form of securities in such amount and form as shall be approved by the Court in which such proceedings shall be instituted;

(9) The attorneys for the petitioner herein further respectfully represent that certain and adequate provision has been made for the payment of just compensation to the party or parties entitled thereto by the Act of Congress approved July 2, 1942 (Public Law 649—77th Congress), which Act appropriated funds for such purposes;

And your petitioner prays that notice, as required by law, be duly issued to the defendants herein and that such notice shall require all persons interested in said lands, or any of them, to come forward and file any opposition, if any they have, to the proposed condemnation of said lands or interests therein; and to set forth the nature and extent of their several ownerships, claims, titles, estates, rights or liens, if any, and that they be adjudicated and
5 forever determined and concluded thereby and that the compensation for damages for the taking of the said lands and interests therein to be herein condemned be ascertained according to law, and the parties entitled to the sum awarded as just compensation for the taking of the said lands with any and all improvements thereon be determined and upon payment to or into the registry of the Court for the use of the parties entitled, of the sum adjudged to be just compensation for the land condemned, that it be adjudged and decreed that a term for years ending June 30, 1943, said term being renewable for additional yearly periods during the existing national emergency at the election of the Secretary of War, which election shall be signified by the giving of notice at any time prior to the expiration of the term hereby taken or subsequent extensions thereof in the said

lands or interests therein and all improvements thereon and all rights thereunto appertaining, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, is vested in the United States of America, and to grant such other and further relief as may be lawful and proper.

And it is further prayed that an order be entered in this cause providing, authorizing and directing the United States of America, the petitioner herein, to take immediate possession of each and all of the lands and various interests therein to as hereinafter more particularly set forth.

UNITED STATES OF AMERICA,
EDMUND J. BRANDON,
United States Attorney.
By PHILIP P. A. O'CONNELL,
Special Assistant to the United States Attorney.

6

In United States District Court

Order of court for possession

February 18, 1943

[Memorandum: The schedule attached to Order of court for possession is here omitted in accordance with Designation. John A. Canavan, Clerk.]

WYZANSKI, J. This cause coming on to be heard at this term of Court upon the duly executed Petition for Condemnation, filed herein on the 18th day of February, 1943, and the further prayer therein contained of the petitioner, the United States of America, to enter an order providing for the fixing of the date when possession of the property therein described is to be surrendered to the United States of America, said petition having been duly read and upon consideration thereof and of said motion and the statutes in such case made and provided, and by authority thereof, it is by the District Court of the United States of America for the District of Massachusetts, this 18th day of February, 1943, ordered and adjudged:

That adequate provision having been made for the payment of just compensation for the land and interests therein to be condemned in this proceeding by the provisions of existing legislation, which said lands and interests therein are shown on a map marked Schedule "B" attached to and made a part of Petition for Condemnation filed herein and are more particularly described in Schedule "A" attached hereto and made a part hereof. The Secretary of War of the United States of America be and he hereby

is authorized to take immediate possession of the said lands and all improvements thereon and all right thereunto appertaining subject, however, to existing easements for public roads and highways, for public utilities, for railroads, and for pipe lines, as prayed
for in the Petition for Condemnation hereinabove referred
7 to and to proceed with such public works thereon as have been authorized by law and as are set forth in the petition for condemnation; that possession of the above-described property shall be surrendered to the United States of America and its duly authorized agents forthwith as have been authorized by law and as are set forth in the Petition for Condemnation:

It is further ordered that the United States Marshal be and he is hereby directed and instructed forthwith to serve an attested copy of this order, said service to be made in any one of the following ways:

(a) By posting a copy of this order on the premises;

(b) By serving a copy of this order upon any person of suitable age and discretion in possession thereof;

(c) By personal service of a copy of this order on the owners of record of said premises as of the time of the filing of the Petition for Condemnation this proceeding; and forthwith make due return of said service to the Court.

This cause is held open for such other and further orders and judgments as may be just and equitable in the premises.

By the Court:

MARY G. TRAVERSE,
Deputy Clerk.

Entered: 2/18/43.

CHARLES E. WYZANSKI, JR., *J.*

In United States District Court

Declaration of taking

Filed April 16, 1943

[Memorandum: The schedules attached to Declaration of taking are here omitted in accordance with Designation. John A. Canavan, Clerk.]

I, Henry L. Stimson, Secretary of War of the United States, do hereby declare that:

1. (a) The lands hereinafter described are taken under and in accordance with the Act of Congress approved Feb-
8 ruary 26, 1931 (46 Stat. 1421, 40 U. S. C. sec. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), April 11, 1918 (40

Stat. 518; 50 U. S. C. sec. 171); the Act of Congress approved March 27, 1942 (Public Law 507—77th Congress), which acts authorize the acquisition of land for military or other war purposes, and the Act of Congress approved July 2, 1942 (Public Law 649—77th Congress), which act appropriated funds for such purposes.

(b) The public uses for which said lands are taken are as follows: The said lands are necessary adequately to provide for storage facilities for the Army Air Forces, and uses incident thereto. The said lands have been selected by me for acquisition by the United States for use in connection with the establishment of the Storage Depot for the Army Air Forces at Springfield, Massachusetts, and for such other uses as may be authorized by Congress or by Executive Order, and are required for immediate use.

2. A general description of the lands being taken is set forth in Schedule "A" attached hereto and made a part hereof, and is a description of the same lands described in the petition in the above-entitled cause.

3. The estate taken for said public uses is a term for years ending June 30, 1943, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, said term for years being renewable for additional yearly periods during the existing National Emergency, at the election of the Secretary of War, which election shall be signified by the giving of notice at any time prior to the expiration of the term hereby taken or subsequent extensions thereof. Said term for years is further subject to the right of the owner
9 to pass and repass to and from the buildings excepted from this taking as set forth in Schedule A. The United States reserves to itself, upon the termination of said term or subsequent extensions thereof, the right to remove improvements made to the land by the United States, including personal property and fixtures constructed thereon or affixed thereto.

4. A plan showing the land taken is annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by me as just compensation for said lands, with all buildings and improvements thereon and all appurtenances thereto, and including any and all interests hereby taken in said lands, for the term ending June 30, 1943, is set forth in Schedule "A" herein, which sum I cause to be deposited herewith in the Registry of said Court for the use and benefit of the persons entitled thereto. I am of the opinion that the ultimate award for said lands will probably be within any limits prescribed by law as the price to be paid therefor.

In witness whereof, the petitioner, by its Secretary of War, thereunto authorized, has caused this declaration to be signed in

its name by said Henry L. Stimson, Secretary of War, this the 13th day of April A. D., 1943, in the City of Washington, District of Columbia.

HENRY L. STIMSON,
Secretary of War of the United States.

In United States District Court

Judgment on the declaration of taking

April 16, 1943

[Memorandum: The schedules attached to Judgment on Declaration of taking are here omitted in accordance with Designation. John A. Canavan, Clerk.]

HEALEY, J. This cause coming on for hearing upon motion of Edmund J. Brandon, United States Attorney in and for the District of Massachusetts, and Philip P. A. O'Connell, Special Assistant to the United States Attorney in and for the said District, attorneys for the petitioner herein, to enter a judgment on the declaration of taking filed herein and for an order fixing the date for the surrender of possession of the land herein described to the petitioner, and upon consideration thereof and of the petition and declaration of taking filed herein and the statutes in such case made and provided, and it appearing to the satisfaction of the Court:

First, that the United States of America is entitled to acquire property by condemnation under judicial process for the purposes as set forth and prayed in said petition;

Second, that the declaration of taking filed herein contains, or has annexed thereto a statement of the authority under which and the public use for which the lands hereinafter described are taken, a description of the said lands taken sufficient for the identification thereof, a statement of the estate or interest taken for the said public use, a plan showing the lands taken, and a statement of the sum of money estimated by the Secretary of War to be just compensation for the interest in the land taken for a period beginning February 18, 1943 and including June 30, 1943, in the total sum of $10,192.43, and that said amount has been deposited into the registry of this Court for the use and benefit of the persons entitled thereto;

Third, that the said declaration of taking filed herein contains a statement that the Secretary of War, the head of the acquiring agency, is of the opinion that the ultimate award of just compensation will be within the limits prescribed by Congress as the price to be paid therefor:

Now, therefore, it is ordered, adjudged and decreed that a
11 term for years, in the land hereinafter described in Schedule "A" attached hereto and made a part hereof, ending June 30, 1943, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, said term for years being renewable for additional yearly periods during the existing National Emergency, at the election of the Secretary of War, which election shall be signified by the giving of notice at any time prior to the expiration of the term hereby taken or subsequent extensions thereof. Said term for years is further subject to the right of the owner to pass and repass to and from the buildings excepted from the taking as set forth in said Schedule "A". The United States reserved to itself, upon the termination of said term or subsequent extensions thereof, the right to remove improvements made to the land by the United States, including personal property and fixtures constructed thereon or affixed thereto, vested in the United States of America upon the filing of said declaration of taking and the depositing in the registry of this Court of the amount of estimated just compensation, which land is situate in the City of Springfield, County of Hampden, Commonwealth of Massachusetts, and more particularly described in said Schedule "A", and that said land is deemed to be condemned and taken for the United States of America and the right to just compensation for the property so taken is vested in the persons entitled thereto; and the amount of such just compensation shall be ascertained and awarded in this proceeding and established by judgment herein pursuant to law, and

This cause is held open for such further and other orders, judgments, and decrees as may be necessary in the premises.

By the Court:

JOSEPH J. DUWAN, *Deputy Clerk.*

Entered: April 16, 1943.

ARTHUR D. HEALEY, *J.*

12 In United States District Court

Amended petition for condemnation

Filed April 19, 1943

[Memorandum: The schedules attached to Amended petition for condemnation are here omitted in accordance with Designation. John A. Canavan, Clerk.]

Comes now the United States of America, represented herein by Edmund J. Brandon, United States Attorney in and for the District of Massachusetts, and Philip P. A. O'Connell, Special

Assistant to the United States Attorney in and for the said District, acting under instructions of the Attorney General of the United States and at the request of the Secretary of War of the United States, and respectfully represents to the Court as follows:

(1) That pursuant to the provisions contained in the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 518; 50 U. S. C. sec. 171); the Act of Congress approved March 27, 1942, Second War Powers Acts, Public Law 507—77th Congress, Second Session, and the Act of Congress approved July 2, 1942 (Public Law 649—77th Congress) and the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U. S. C. sec. 258a), and all other Acts or parts of Acts amendatory thereof or supplementary thereto, the Secretary of War of the United States of America has been authorized and empowered to acquire by condemnation the land hereinafter described for use in connection with storage facilities and for other related military purposes in that part of Springfield known as Indian Orchard, Massachusetts;

(2) That this proceeding is instituted by direction of the Attorney General of the United States at the request of the Secretary of War of the United States.

(3) That the interest to be acquired is a term for years
13 ending June 30, 1943, subject to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, said term being renewable for additional yearly periods during the existing national emergency at the election of the Secretary of War, which election shall be signified by the giving of notice at any time prior to the expiration of the term hereby taken or subsequent extensions thereof. Said term for years is further subject to the right of the owner to pass and repass to and from the buildings excepted from this taking, as set forth in said Schedule "A". The United States reserves to itself, upon the termination of said term or subsequent extensions thereof, the right to remove improvements made to the land by the United States, including personal property and fixtures constructed thereon or affixed thereto;

(4) That for use in connection with the aforesaid purposes, the Secretary of War of the United States of America has determined it is necessary and advantageous to the United States of America to acquire the lands or interests therein and all improvements thereon and all rights thereunto appertaining by condemnation under judicial process, and all preliminary and administrative steps required by law have been taken;

(5) That the lands or interests therein sought to be condemned are shown on a plan marked Schedule "B" and more particularly

described in Schedule "A", both of which are attached hereto and made a part hereof;

(6) That according to the land records of the county of Hampden and other evidence presently available to your petitioner, it appears that title to the lands hereinafter described together with all improvements thereon, is now vested in those persons, firms or corporations set out in Schedule "C" attached hereto and made a part hereof;

14 (7) That in addition to the persons named, there are or may be other persons, firms or corporations, whose names are unknown to petitioner who have or who may claim to have some interest in the property hereinafter described or who may claim to be entitled to compensation with respect to the taking thereof, and petitioner, therefore, makes parties defendant hereto all persons, firms and corporations, known and unknown, who have, or who may claim to have any right, title, interest or estate in, or lien, encumbrance, servitude, easement, demand or claim on or in respect of the hereinafter described premises;

(8) The attorneys for the petitioner herein further respectfully represent to the Court that the Secretary of War of the United States of America has determined that it is necessary to take immediate possession of certain real property herein described; that under the provisions of the Act of Congress approved March 27, 1942 (Public Law 507—77th Congress) and all other Acts or parts of Acts amendatory thereof or supplementary thereto, the United States of America has the right to take immediate possession of any lands, easements, or rights of way needed for use in connection with the aforesaid purposes duly authorized by Congress to the extent of the interest to be acquired by the United States, and proceed with such military purposes thereon as have been authorized by Congress, Provided, however, that certain and adequate provision shall have been made for the payment of just compensation to the party or parties entitled thereto, either by previous appropriation by the United States of America or by the deposit of monies or other form of security in such amount and form as shall be approved by the court in which such proceedings shall be instituted;

(9) The attorneys for the petitioner herein further respectfully represent that certain and adequate provision has been
15 made for the payment of just compensation to the party or parties entitled thereto by the Act of Congress approved July 2, 1942 (Public Law 649—77th Congress), which Act appropriated funds for such purposes;

And your petitioner prays that notice, as required by law, be duly issued to the defendants herein and that such notice shall require all persons interested in said lands, or any of them, to come

forward and file any opposition, if any they have, to the proposed condemnation of said lands or interests therein; and to set forth the nature and extent of their several ownerships, claims, titles, estates, rights or liens, if any, and that they be adjudicated and forever determined and concluded thereby and that the compensation for damages for the taking of the said lands and interests therein to be herein condemned be ascertained according to law, and the parties entitled to the sum awarded as just compensation for the taking of the said lands with any and all improvements thereon be determined and upon payment to or into the registry of the Court for the use of the parties entitled, of the sum adjudged to be just compensation for the land condemned, that it be adjudged and decreed that a term for years ending June 30, 1943, said term being renewable for additional yearly periods during the existing national emergency at the election of the Secretary of War, which election shall be signified by the giving of notice at any time prior to the expiration of the term hereby taken or subsequent extensions thereof in the said lands or interests therein and all improvements thereon and all rights thereunto appertaining, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, is vested in the United States of America, and to grant such other and further relief as may be lawful and proper.

And it is further prayed that an order be entered in this cause, providing, authorizing and directing the United
16 States of America, the petitioner herein, to take immediate possession of each and all of the lands and various interests therein to as hereinafter more particularly set forth.

UNITED STATES OF AMERICA,
EDMUND J. BRANDON,
United States Attorney.
By PHILIP P. A. O'CONNELL,
Special Assistant to the United States Attorney.

[*Duly sworn to by Philip P. A. O'Connell; jurat omitted in printing.*]

In United States District Court

Election to extend term for years

Filed May 1, 1943

Notice is hereby given that the Secretary of War of the United States of America has elected to extend the term for years heretofore acquired, expiring June 30, 1943, in the land and improvements thereon described in Amended Petition for Condem-
17 nation and Declaration of Taking filed in these proceedings, and Judgement on Declaration of Taking entered thereon, to June 30, 1944.

The aforesaid extensions is subject to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, said term being renewable for additional yearly periods during the existing National Emergency, at the election of the Secretary of War, which election shall be signified by the giving of notice at any time prior to the expiration of the extension of the term hereby taken or subsequent extensions thereof. Said term for years is further subject to the right of the owner to pass and repass to and from the buildings excepted from this taking as set forth in Schedule "A" attached to and made a part of said Amended Petition for Condemnation, Declaration of Taking and Judgment on Declaration of Taking. The United States of America reserves to itself, upon the termination of said extension of term or subsequent extensions thereof, the right to remove improvements made to the land by the United States, including personal property and fixtures constructed thereon or affixed thereto.

UNITED STATES OF AMERICA,
EDMUND J. BRANDON,
United States Attorney.
By PHILIP P. A. O'CONNELL,
Special Assistant to the United States Attorney.

In United States District Court

Supplemental declaration of taking

Filed August 23, 1943

[Memorandum: The schedule attached to Supplemental declaration of Taking is here omitted in accordance with Designation. John A. Canavan, Clerk.]

Whereas, I have elected to extend the term which was condemned in this proceeding for an additional term of one
18 year commencing July 1, 1943, and ending June 30, 1944; and

Whereas, the sum estimated to be just compensation for the taking of said extension term of one year is not included in the monies heretofore deposited with this court in this proceeding.

Now, therefore, I, Robert P. Patterson, Acting Secretary of War of the United States, acting pursuant to the powers and authorities recited in the petition and declaration of taking on file in this proceeding, do estimate the just compensation for the taking of the property described in this proceeding for the extension term of one year, commencing July 1, 1943 and ending June 30, 1944, to be $52,671.60, which sum I cause to be deposited herewith in the registry of this Honorable Court for the use and benefit of the persons entitled thereto. The allocation of said

sum to the various tracts of land involved in the proceeding is set forth in Schedule "A", attached hereto and made a part hereof. I am of the opinion that the ultimate award for said extension term will probably be within any limits prescribed by law as the price to be paid therefor.

In witness whereof, the petitioner by its Acting Secretary of War thereunto authorized has caused this supplemental declaration of taking to be signed in its name and on its behalf by said Acting Secretary of War this the 26th day of July 1943, in the City of Washington, District of Columbia.

ROBERT P. PATTERSON,
Acting Secretary of War of the United States.

In United States District Court

Judgment on declaration of taking as supplemented nunc pro tunc

October 22, 1943

19 WYZANSKI, J. This cause coming on for hearing upon motion of Edmund J. Brandon, United States Attorney in and for the District of Massachusetts, and Philip P. A. O'Connell, Special Assistant to the United States Attorney in and for the said District, attorneys for the petitioner herein, to enter a judgment on the declaration of taking and supplemental declaration of taking in connection therewith, filed herein, and upon consideration thereof and of the statutes in such case made and provided, and it appearing to the satisfaction of the Court:

First, that the United States of America is entitled to acquire property by condemnation under judicial process for the purposes as set forth and prayed for in said petition;

Second, that the Declaration of Taking and the Supplemental Declaration of Taking filed herein contains or has annexed thereto a statement of the authority under which and the public use for which the interest in the lands hereinafter described are taken, a description of the said lands sufficient for the identification thereof, a statement of the estate or interest taken for the said public use, a plan showing the lands taken, and a statement of the sum of money estimated by the Secretary of War of the United States to be just compensation for the land or interests in the lands described in the Declaration of Taking, ending June 30, 1944, in the total sum of $71,864.03 for the period beginning February 18, 1943 to and including June 30, 1944, and that said amount has been deposited into the Registry of this Court, allocations of which amount appear in Schedule "A" attached to original and

supplemental Declarations of Taking filed herein, for the use and benefit of the persons entitled thereto;

Third, that said Declaration of Taking and Supplemental Declaration of Taking filed herein contain statements that the Secretary of War, the head of the acquiring agency, is of the
20 opinion that the ultimate award of just compensation for the interest acquired under the Declaration of Taking and the extension of the same in Supplemental Declaration of Taking will be within the limits prescribed by Congress as the price to be paid therefor;

Now, therefore, it is ordered, adjudged, and decreed that a term for years in the lands described in Schedule "A" attached to and made a part of Declaration of Taking herein filed, ending June 30, 1944, subject to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, said term for years being renewable for additional yearly periods during the existing national emergency at the election of the Secretary of War, which election shall be signified by the giving of notice at any time prior to the expiration of the term hereby taken or subsequent extensions thereof. Said term for years is further subject to the right of the owner to pass and repass to and from the buildings excepted from the taking as set forth in said Schedule "A". The United States reserves to itself upon the termination of said term or subsequent extension thereof, the right to remove improvements made to the land by the United States including personal property and fixtures constructed thereon or affixed thereto, vested in the United States of America upon the filing of said Declaration of Taking and Supplemental Declaration of Taking and the depositing of the amounts of estimated just compensation in the Registry of this Court, which lands are situate in the City of Springfield, County of Hampden, and Commonwealth of Massachusetts, as shown on a map marked Schedule "B", and more particularly described in Schedule "A", both of which are attached to and made a part of Declaration of Taking herein filed, and that a term for years in said land together with the improvements thereon expiring June 30, 1944, subject to the foregoing rights and easements is deemed to be condemned
21 and taken for the United States of America, and the right to just compensation for the interest in the property so taken is vested in the persons entitled thereto; and the amount of such just compensation shall be ascertained and awarded in this proceeding, and established by judgment herein pursuant to law.

This cause is held open for such further and other orders, decrees and judgments as may be necessary in the premises.

By the Court:

MARY G. TRAVERSE,
Deputy Clerk.

Entered:

CHARLES E. WYZANSKI, JR., *J.*

10/22/43 4:55 P. M.

In United States District Court

Election to extend term for years

Filed May 25, 1944

Pursuant to Section 3 of the Petition for Condemnation filed herein, the United States of America, acting through the Secretary of War, has elected to extend the term for years heretofore acquired, expiring June 30, 1944 in the land and improvements thereon, which lands are more particularly described in Schedule "A" attached to and made a part of Petition for Condemnation and Declaration of Taking herein filed, and in Judgment on Declaration of Taking heretofore entered, for an additional year expiring June 30, 1945, inclusive.

The aforesaid extension is subject to all the conditions set out in the Petition for Condemnation heretofore filed in this proceeding.

UNITED STATES OF AMERICA,
EDMUND J. BRANDON,
United States Attorney.
By PHILIP P. A. O'CONNELL,
Special Assistant to the United States Attorney.

22 In United States District Court

Supplemental declaration of taking

Filed August 2, 1944

[Memorandum: The schedule attached to Supplemental declaration of taking is here omitted in accordance with Designation. John A. Canavan, Clerk.]

To the Honorable, the United States District Court:

Whereas, I have elected to extend the term for years which was condemned in this proceeding for an additional term of one year, commencing July 1, 1944, and ending June 30, 1945; and

Whereas, the sum estimated to be just compensation for the

taking of said extension term of one year is not included in the monies heretofore deposited with this Court in this proceeding,

Now, therefore, I, Robert P. Patterson, Acting Secretary of War of the United States, acting pursuant to the powers and authorities recited in the petition and declaration of taking on file in this proceeding, do estimate the just compensation for the taking of the property described in this proceeding for the extension term of one year, commencing July 1, 1944, and ending June 30, 1945, to be $52,671.60, which sum I cause to be deposited herewith in the Registry of this Honorable Court for the use and benefit of the persons entitled thereto. The allocation of said sum to the various tracts of land involved in the proceeding, is set forth in Schedule "A", attached hereto, and made a part hereof. I am of the opinion that the ultimate award for said extension term will probably be within any limits prescribed by law as the price to be paid therefor.

In witness whereof, the petitioner, by its Acting Secretary of War, thereunto authorized, has caused this supplemental declaration of taking to be signed in its name and on its behalf
23 by said Acting Secretary of War, this the 8th day of July A. D. 1944, in the City of Washington, District of Columbia.

ROBERT P. PATTERSON,
Acting Secretary of War of the United States.

In United States District Court

Judgment on declaration of taking as amended and supplemented

August 2, 1944

SWEENEY, J. This cause coming on for hearing upon motion of Edmund J. Brandon, United States Attorney in and for the District of Massachusetts, and Philip P. A. O'Connell, Special Assistant to the United States Attorney in and for the said District, attorneys for the petitioner herein, to enter a judgment on the Declaration of Taking as Supplemented and Amended filed in connection therewith on the 2nd day of August 1944, and upon consideration thereof and of the statutes in such case made and provided, and it appearing to the satisfaction of the Court:

First, that the United States of America is entitled to acquire property by condemnation under judicial process for the purposes as set forth and prayed for in said petition:

Second, that the Declaration of Taking as Supplemented and Amended, both of which are filed herein, contains or has annexed thereto a statement of the authority under which and the public use for which the interest in the lands hereinafter described are

taken, a description of the said lands sufficient for the identification thereof, a statement of the estate or interest taken for the said public use, a plan showing the lands taken, and a statement of the sum of money estimated by the Secretary of War of the United States to be just compensation for the land or interests in the lands described in the Declaration of Taking, in the
24 total sum of $52,671.60 for the period beginning July 1, 1944 and ending June 30, 1945, and that said amount has been deposited into the Registry of this Court, allocations of which amount appear in Schedule "A" attached to original and supplemental Declartions of Taking filed herein, for the use and benefit of the persons entitled thereto;

Third, that said Declaration of Taking and Amended and Supplemental Declarations of Taking filed herein contain statements that the Secretary of War, the head of the acquiring agency, is of the opinion that the ultimate award of just compensation for the interest acquired under the Declaration of Taking and the extensions of the same in Supplemental Declaration of Taking will be within the limits prescribed by Congress as the price to be paid therefor;

Now, therefore, it is ordered, adjudged and decreed that a term for years in the lands described in Schedule "A" attached to and made a part of Declaration of Taking herein filed, ending June 30, 1945, subject to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, said term for years being renewable for additional yearly periods during the existing national emergency at the election of the Secretary of War, which election shall be signified by the giving of notice at any time prior to the expiration of the term hereby taken or subsequent extensions thereof. Said term for years is further subject to the right of the owner to pass and repass to and from the buildings excepted from the taking as set forth in said Schedule "A". The United States reserves to itself upon the termination of said term or subsequent extensions thereof, the right to remove improvements made to the land by the United States including personal property and fixtures constructed thereon or affixed thereto, vested in the United States of America upon the filing of said Declaration of Taking and Supplemental and
25 Amended Declarations of Taking and the depositing of the amounts of estimated just compensation in the Registry of this Court, which lands are situate in the city of Springfield, County of Hampden, and Commonwealth of Massachusetts, as shown on a map marked Schedule "B", and more particularly described in Schedule "A", both of which are attached to and made a part of Declaration of Taking herein filed, and that a term for years in said land together with the improvements thereon

expiring June 30, 1945, subject to the foregoing rights and easements is deemed to be condemned and taken for the United States of America, and the right to just compensation for the interest in the property so taken is vested in the persons entitled thereto; and the amount of such just compensation shall be ascertained and awarded in this proceeding, and established by judgment herein pursuant to law.

This cause is held open for such further and other orders, decrees and judgments as may be necessary in the premises.

By the Court:

JANE D. FAHEY,
Deputy Clerk.

Entered:

GEO. C. SWEENEY, *J.*

8-2-44.

Schedule "A"

PARCEL A

A certain parcel of land located on the northerly side of Quinnehtuck Canal, so-called, situated in that part of Springfield known as Indian Orchard, County of Hampden and Commonwealth of Massachusetts, more particularly bounded and described as follows:

Beginning at a stone bound located on the northerly side of said Canal, said stone bound being in line 10 feet south and 30 feet east from the southeasterly corner of Mill Building #6;
26 thence turning and running S 65°20'30" W along a line 10 feet distant southerly from and parallel to the southerly sides of Mill Buildings #6, #1 and #2 for a distance of 632.31 feet, more or less, to a stone bound, thence turning and running N 37° W along the easterly boundary line of land now or formerly belonging to the Indian Orchard Company for a distance of 341.09 feet, more or less, to a point located 10 feet distant in a southerly direction from the southerly side of Mill Building #16; thence turning and running in a northeasterly direction and at right angles to the last mentioned course for a distance of 33 feet, more or less; thence turning and running in a northwesterly direction and at right angles to the last mentioned course for a distance of 42 feet, more or less; thence turning and running in a southwesterly direction and at right angles to the last mentioned course for a distance of 33 feet, more or less, to a point located on the easterly boundary line of land belonging to said Indian Orchard Company; thence turning and running N 24°37' W along said easterly boundary line for a distance of 23 feet, more or less, to a point located on the M. H. W. line of the Chicopee River; thence following the M. H. W. line of said Chicopee River by the following courses and distances: N 70°6'30" E 144.39 feet;

N 72°11′ E 146.78 feet; S 78°13′ E 94.52 feet; S 73°31′ E 84.48 feet; S 86°45′ E 54.06 feet; S 70°23′ E 48.34 feet; S 78°54′ E 181.57 feet to a point on the westerly line of land now or formerly belonging to the Quinnehtuck Company; thence turning and running along said westerly boundary line S 29°45′30″ W for a distance of 23.41 feet, more or less, to a stone bound; thence continuing along said westerly boundary line S 24°37′ E for
27 a distance of 91.35 feet, more or less, to the point or place of beginning.

Containing 4.2 acres, more or less.

PARCEL "B"

DESCRIPTION

A certain parcel of land located on the southerly side of Quinnehtuck Canal, so-called, situated in that part of Springfield, known as Indian Orchard, County of Hampden, and the Commonwealth of Massachusetts, more particularly bounded and described as follows:

Beginning at a point in the line of a fence 30 feet, more or less, in a Northeasterly direction from the extreme Southeasterly corner of an office building known as Office No. 2; thence running Northwesterly 37 feet, more or less, to a point on the Southerly line of aforesaid Quinnehtuck Canal, last described line being at right angles to said Southerly side line of canal; thence running Northeasterly along said Southerly side line of canal, 314 feet, more or less, to a point; thence turning an angle of 90 degrees with the last-mentioned line and running Southeasterly 55 feet, more or less, to a fence; thence Southwesterly and parallel to said canal along said fence, a distance of 64 feet, more or less, to an angle; thence Northwesterly along said fence 21 feet, more or less, to an angle; thence Southwesterly and parallel to said canal along said fence in part, and in part along the South wall of storehouses 3 and 4, a distance of 120 feet, more or less, to the Southwesterly corner of Storehouse No. 4; thence Northwesterly at right angles to last-mentioned line, a distance of 4 feet, more or less, to a fence; thence Southwesterly along said fence, and parallel to said canal a distance of 115 feet, more or less, to the point of beginning.

28 Containing .299 of an acre, more or less.

Together with the right to use the Railroad spur track which is contiguous to Buildings Nos. 3 and 4, located on the above-described land. The spur track is on the Southerly side of said Buildings Nos. 3 and 4, and connects with the Athol branch of the Boston & Albany Railroad.

In United States District Court

Stipulation of agreed facts and issues of law

Filed May 27, 1947

Agreed Facts

This stipulation made and entered into by and between the United States of America, the Hodges Carpet Company, a corporation, and the Westinghouse Electric Corporation, by their respective counsel of record;

Witnesseth: that for the purposes of this case it is agreed as follows:

1. That in the above-captioned proceeding, the United States of America, in the exercise of its right of eminent domain, instituted a proceeding for the condemnation of the use and occupancy of the subject land contained in this proceeding for a term for years ending June 30, 1943, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, said term for years being renewable for additional yearly periods during the existing national emergency, at the election of the Secretary of War, which election shall be signified by the giving of notice at any time prior to the expiration of the term hereby taken or subsequent extensions thereof, by the filing of a Petition for Condemnation on the 18th day of February, 1943, at which time possession of said property was awarded to the petitioner. Thereafter, on April 16, 1943, a Declara-
29 tion of Taking was filed, Judgment entered thereon, and the sum of Eighteen Thousand, Six Hundred Fifty Four and 58/100 Dollars ($18,654.58) deposited into the Registry of the Court as estimated just compensation for the term extending from February 18, 1943 to June 30, 1943.

2. Thereafter, on May 1, 1943, and May 25, 1944, upon the exercise of the right of renewal of the term by the Secretary of War, the United States extended the term for two additional yearly periods ending June 30, 1944, and June 30, 1945, respectively, and deposited the sum of Fifty One Thousand, One Hundred Ninety Five and 60/100 Dollars ($51,195.60) as estimated just compensation for each of the respective yearly extensions.

3. That, at the time of the taking, the Hodges Carpet Company was the owner in fee simple of the subject property, and the Westinghouse Electric Corporation a lessee of a portion thereof, occupying under a lease dated January 19, 1942, for a term expiring October 30, 1944, copy of which lease is attached hereto and made a part of this stipulation.

4. That in order to surrender possession of the subject property to the United States, in compliance with the Order of immediate

possession entered by the Court on February 18, 1943, the Westinghouse Electric Corporation, lessee, was required to, and did, remove therefrom FORTHWITH and in so doing incurred certain costs and expenses of removal of its personal property aggregating the sum of Twenty Five Thousand, Six Hundred and 00/100 Dollars ($25,600.00) which it is agreed represents the full and complete claim for compensation of said lessee against the United States of America on behalf of, or arising under the lease of the Westinghouse Electric Corporation.

5. Had the parties proceeded to formal trial before a jury, witnesses for Westinghouse Electric Corporation would testify
30 that Westinghouse Electric Corporation actually expended Twenty Five Thousand, Six Hundred and 00/100 Dollars ($25,600.00) for the cost and expenses of labor, material, and transportation in moving its property from the location in question to a new location; that said expense was a necessary expenditure; that the amount expended was a fair and reasonable sum for such removal; that as of February 18, 1942 the market rental value of so much of the building in question as was occupied by the Westinghouse Electric Corporation as a lessee, on a sublease which would be given by it as long-term tenant to a temporary occupier over and above the rent reserved under its lease, was the sum of Twenty Five Thousand, Six Hundred and 00/100 Dollars ($25,600.00), being its removal cost to make the property available to the temporary occupier; and that said sum was the value of the occupancy of Westinghouse Electric Corporation under its said lease. However, the admissibility of such evidence is not conceded and thereby reserved for the determination of the Court.

6. That the deposit made by the government represents the fair market rental value of the bare unheated warehouse space taken and, if upon the facts and evidence agreed, if admissible, Westinghouse Electric Corporation is entitled to recover for the loss of its right to occupy under its lease as a matter of law, then a finding should be entered determining the just compensation to be in the sum of One Hundred Forty Six Thousand, Six Hundred Forty Five and 78/100 Dollars ($146,645.78), inclusive of interest, and an order be entered disbursing the sum of Twenty Five Thousand, Six Hundred and 00/100 Dollars ($25,600.00) to Westinghouse Electric Corporation, and the sum of One Hundred Twenty One Thousand, Forty Five and 78/100 Dollars ($121,045.78), being the total amount of the deposits, to Hodges Carpet Company. In the event, as a matter of law, the Westinghouse Electric
31 Corporation is not entitled to recover, then a finding should be entered determining the just compensation to be in the sum of One Hundred Twenty One Thousand, Forty Five and 78/100 Dollars ($121,045.78), inclusive of interest, the said amount

of the deposit, and that an order for distribution be immediately entered ordering disbursement of the aforesaid amount of One Hundred Twenty One Thousand, Forty Five and 78/100 Dollars ($121,045.78) heretofore deposited, less prior disbursements, to the Hodges Carpet Company. By this stipulation, Westinghouse Electric Corporation waives any claim in these proceedings against Hodges Carpet Company and the United States of America other than the aforesaid claim for Twenty Five Thousand, Six Hundred and 00/100 Dollars ($25,600.00) against the United States of America.

Issues of law

In view of the foregoing stipulation of agreed facts, it is considered that no factual matters remain to be determined, and that the sole issue of law before the Court is as follows:

1. Is Westinghouse Electric Corporation entitled to recover from the United States of America the sum of Twenty Five Thousand, Six Hundred and 00/100 Dollars ($25,600.00) as the value of its occupancy under the lease upon the foregoing facts and evidence?

UNITED STATES OF AMERICA,
WILLIAM T. McCARTHY,
United States Attorney.
By PHILIP P. A. O'CONNELL,
Special Assistant to the United States Attorney.
By CHARLES M. IRELAN,
Attorney, Department of Justice.

32

HODGES CARPET COMPANY,
HAROLD SUIGER;
By SUIGER, STONEMAN & KURLAND,
Its Attorney.
WESTINGHOUSE ELECTRIC CORPORATION,
By MILTON DONOVAN, *Its Attorney.*

Dated this 27th day of May 1947.

Lease

This indenture, made the 19th day of January, in the year of our Lord one thousand nine hundred and forty-two (1942).

Witness, that Hodges Carpet Company, of Springfield, Massachusetts, hereinafter referred to as Lessor, does hereby lease, demise, and let unto Westinghouse Electric & Manufacturing Company, hereinafter referred to as Lessee, all those certain premises constituting the first floor of #1 Mill and the first floor of #2 Mill, being a total of thirty thousand (30,000) square feet and the

second floor of #1 Mill and the second floor of #2 Mill being an additional thirty thousand (30,000) square feet this latter space to become a part of this lease on January 15, 1942, in the Hodges Carpet Company Plant in the City of Springfield, Massachusetts.

To have and to hold for the term of three (3) years commencing on November 1, 1941 and ending on January 15th, 1942 for 30,000 square feet and beginning on January 16th and ending on October 31, 1944 for 60,000 square feet and yielding and paying, therefore, the rent of twenty-five cents (25¢) per square foot per year making a total rent of Forty Three Thousand, Four Hundred and Thirty Seven Dollars and Fifty Cents ($43,437.50) for the said period of three years.

And the said Lessee does promise to pay to the Lessor and
33 to the Reconstruction Finance Corporation the said rent in monthly installments in accordance with leased space beginning on November 1, 1941, and on the first day of each consecutive month thereafter to and including October 1, 1944; and to quit and deliver up the premises to the Lessor, peaceably and quietly, at the end of the term, in as good order and condition, reasonable use and wearing thereof, fire and other unavoidable casualties excepted, as the same now are, or may be put into by the said Lessor, and to pay the rent as above stated during the term, and also the rent as above stated for such further time as the Lessee may hold the same, and not make or suffer any waste thereof; nor sublease, nor underlet, nor assign this lease, nor permit any other person or persons to occupy or improve the same, or make or suffer to be made any alternative therein, but with the approbation of the Lessor thereto, in writing, having been first obtained; and that the Lessor may enter to view and make improvements.

PROVIDED ALSO, and these presents are upon this condition, that if the Lessee shall neglect or fail to perform or observe any of the covenants contained in these presents, and on its part to be performed or observed, or if the estate hereby created shall be taken on execution, or by other process of law, or if the Lessee shall be declared bankrupt or insolvent according to law, or if any assignment shall be made of its property for the benefit of creditors, then, and in any of the said cases (notwithstanding any license of any former breach of covenant or waiver of the benefit hereof or consent in a former instance), the Lessor lawfully may, immediately, or at any time thereafter, and without demand or notice, enter into and upon the said premises or any part thereof in the name of the whole, and repossess the same

as of its former estate, and expel the Lessee and those claiming through or under it and remove its effects (forcibly, if
34 necessary) without being deemed guilty of any manner of trespass, and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant, and upon entry as aforesaid this lease shall determine; and the Lessee covenants that in case of such termination, it will indemnify the Lessor against all loss of rent and other payments which it may incur by reason of such termination during the residue of the time first above specified for the duration of the said term; and that the Lessor may expel the Lessee if it shall fail to pay the rent as aforesaid or make or suffer any strip or waste thereof.

And provided also, that in case the premises, or any part thereof during the said term, be destroyed or damaged by fire or other unavoidable casualty, so that the same shall be thereby rendered unfit for use and habitation, then, and in such case, the rent hereinbefore reserved, or a just and proportional part thereof, according to the nature and extent of the injuries sustained, shall be suspended or abated until the said premises shall have been put in proper condition for use and habitation by the said Lessor, or these presents shall thereby be determined and ended at the election of the said Lessor or its legal representatives.

Lessor shall heat the premises sufficiently to prevent freezing of the sprinklers and, in any event, to a minimum temperature of 60° F. with outside temperature of 0° F.

Lesseee shall have the right to install and attach any machinery and equipment it desires to install, all of which shall remain its property and may be removed by it upon the termination of this Lease by expiration of the term or otherwise.

Lessee shall have the right to install loading platforms, to remove brick work, windows, floorings, and to make other structural alterations to provide handling facilities suitable and
35 convenient to Lessee, in which event Lessee shall restore the premises at the expiration of this Lease to their original structural condition, ordinary wear and tear excepted.

Lessee shall have the right to enter the premises at any time during the term of this Lease, including access for trucks.

Lessor shall provide elevator service adequate for the use of the Lessee at a cost not to exceed twenty-two per cent (22%) of the Lessor's elevator operating cost, such service to be performed only as requested by the lessor.

In witness whereof the said parties have hereunto interchangeably set their hands and seals the day and year first above written.

HODGES CARPET COMPANY,
By (S) WINSOR B. DAY, *Lessor.*
WESTINGHOUSE ELECTRIC &
MANUFACTURING COMPANY,
By (S) W. G. MARSHALL, *Lessee.*

Signed and sealed in presence of:
Original signed by

H. A. MACDOUGAL.
(S) A. N. CUNNINGHAM.

In United States District Court.

OPINION

June 12, 1947

SWEENEY, J. In this action the Westinghouse Electric Corporation seeks to recover from the petitioner just compensation for the taking of its leasehold rights to occupy the premises in question. The petitioner denies its liability to pay just compensation to this claimant, basing its decision upon the fact that it
36 took the entire interest which the Corporation had in the lease, even though it took it piece by piece.

FINDINGS OF FACT

The parties hereto have filed an agreed statement of facts, including the amount of damages, if any, which the Court adopts as its findings of fact. The effect of the stipulation is to leave open only a simple question of law. That question is as follows: "Is Westinghouse Electric Corporation entitled to recover from the United States of America the sum of $25,600.00 as the value of its occupancy under a lease of the premises in question?" Stated succinctly, the facts are these:

On February 18, 1943, the Corporation occupied the property under a lease which was to expire late in 1944. At that time the government, by a petition for condemnation, acquired the use and occupancy of the leased premises for the stated period from February 18, 1943, to June 30, 1943, with the right to renew said term for successive annual periods during the existence of the war emergency. Immediate possession of the property was given to the government. The right of renewal was exercised on or about June 30, 1943, for a period of one year, and it was again exercised on or about June 30, 1944. By the exercise of these options the entire leasehold was taken. The Corporation contends that United States v. General Motors Corp., 323 U. S. 373,

is decisive of this case. It urges that the General Motors taking, as amended after judgment in the lower court, is on all fours with the government's taking in the instant case. If further urges that the value of the interest taken, on the day that it is taken, is the measure of its right to recovery. The government contends that the decision in United States v. Petty Motor Co., 327 U. S. 372, fixes the law in this case. I do not consider the taking in the Petty case analogous to the taking in the instant case for,
37 while it reached the same result, the original taking in the Petty case was for the entire balance of the term of the lease, with an option to surrender earlier. I think that this case must be governed by the decision in the General Motors case. I doubt that the fact that the government has exercised its option sufficiently to wipe out the balance of the Corporation's lease can have any effect upon the claimant's right to recover for its interest in the leasehold.

On February 18, 1943, the Corporation possessed a leasehold which had some value. The government did not elect to take the entire term of the lease in one taking, nor did it go so far as it did in the Petty case to take the entire balance of the term, with a right to early cancellation. It did exactly what was done in the General Motors case; that is, it took a portion of the term with the option for annual renewals. The tenant's right to just compensation arose on that day. I cannot believe that a tenant's right to just compensation for an interest taken can be defeated by the government's taking successive bites at the remainder so as to consume the whole eventually. If the government had taken three definite terms in three separate condemnation proceedings, there would be no question that they would be liable under the General Motors decision. I doubt if the tenant's rights can be defeated by the use of one condemnation proceeding with the option to take the balance piece by piece.

CONCLUSIONS OF LAW

From the foregoing I conclude and rule that the Westinghouse Electric Corporation is entitled to judgment against the United States in the sum of $25,600.00.

In United States District Court

Judgment as to parcel A

November 24, 1947

SWEENEY, J. The above-entitled proceeding came duly
38 on for hearing on Stipulation of Agreed Facts and Issues of Law entered into by all parties in interest, represented by their respective counsel, before this Court without a jury on

May 29, 1947, at a term of this Court holden at Boston, County of Suffolk, Commonwealth of Massachusetts, within the jurisdiction of this Court aforesaid, the United States of America by its attorney, and the respondents, Hodges Carpet Company and Westinghouse Electric and Manufacturing Company, by their attorneys, being the parties interested therein announcing ready for hearing, the Court proceeded to hear arguments thereon.

The cause having been duly tried on May 29, 1947, the Court by an Opinion entered in this Court on June 12, 1947, ruled that the Westinghouse Electric and Manufacturing Company is entitled to Judgment against the United States of America in the sum of Twenty Five Thousand Six Hundred and 00/100 Dollars ($25,600.00) inclusive of interest; that pursuant to Paragraph 6 of the aforesaid Stipulation of Agreed Facts and Issues of Law, and the ruling of the Court, the Court finds that the value of the land and all title and interest therein, including all lawful damages sustained by the owners thereof, and all other persons, corporations or associations or parties having any lawful interests in said land, estimating the same as an entire estate, and as if all lawful damages accruing to the owners and other persons interested therein, by reason of the condemnation thereof, to the uses of the United States, were the sole property of the owner in fee simple, is One Hundred Forty Six Thousand Six Hundred Forty Five and 78/100 Dollars ($146,645.78), inclusive of interest.

The United States of America having heretofore filed a Declaration of Taking and amendments thereto, pursuant to the statutes in such case made and provided, deposited certain monies
39 as estimated just compensation for the taking of the temporary use and occupancy of the aforesaid land described in the Petition for Condemnation and Declarations of Taking filed in the above-entitled proceeding.

It is ordered, adjudged and decreed: That as to the aforesaid land, the total just compensation due therefor, is the sum of One Hundred Forty Six Thousand, Six Hundred Forty Five and 78/100 Dollars ($146,645.78), and the same is hereby fixed at said sum; of which the sum of $121,045.78 represents the total rental value thereof awarded to the Hodges Carpet Company as owner, and the sum of $25,600.00 being the cost of removal received by Westinghouse Electric and Manufacturing Company as tenant of a portion of the premises and awarded as the value of the occupancy of the Westinghouse Electric and Manufacturing Company under its lease; that there has heretofore been deposited as estimated just compensation therefor the sum of One Hundred Twenty One Thousand, Forty Five and 78/100 Dollars ($121,045.78), and by reason of the finding aforesaid, the owners and claimants of the above land do have and recover from the United States of

America as and for just compensation for the condemnation of the aforesaid land, a deficiency judgment in the sum of Twenty Five Thousand, Six Hundred and 00/100 Dollars ($25,600.00), without interest thereon.

By the Court:

JANE D. FAHEY,
Deputy Clerk.

Entered:
11-24-47.

GEO. C. SWEENEY, *J.*

In United States District Court

Notice of appeal

Filed February 19, 1948

Notice is hereby given that the United States of America hereby appeals to the United States Circuit Court of Appeals for the First Circuit from that portion of the judgment entered in this Court on November 24, 1947 as pertains to the Westinghouse Electric and Manufacturing Co.

UNITED STATES OF AMERICA,
WILLIAM T. MCCARTHY,
United States Attorney.
By PHILIP P. A. O'CONNELL,
Special Assistant to the United States Attorney.

Statement of points to be relied upon on appeal

Filed February 24, 1948

The United States of America, appellant in the above entitled case, states that the following points will be relied upon on the appeal herein:

The district court erred:

1. In holding that the expenses of removal of Westinghouse Electric Corporation from the premises might be considered in determining compensation to which it was entitled.

2. In holding that the decision in United States v. General Motors Corp., 323 U. S. 373, is controlling in this proceeding.

3. In determining the issue of law in favor of Westinghouse Electric Corporation.

4. In entering the judgment of November 24, 1947.

UNITED STATES OF AMERICA,
Appellant.
WILLIAM T. MCCARTHY,
United States Attorney.
By PHILIP P. A. O'CONNELL,
Special Assistant to the United States Attorney.

41 In United States District Court

Designation of record on appeal

Filed February 24, 1948

The United States of America, appellant in the above-entitled case, designates the following for the record on appeal:

		Filed
1.	Petition for condemnation, omitting schedules attached thereto	February 18, 1943
2.	Order for possession, omitting scheduled attached thereto	February 18, 1943
3.	Declaration of taking, omitting schedules attached thereto	April 16, 1943
4.	Judgment on declaration of taking, omitting schedules attached thereto	April 16, 1943
5.	Amended petition for condemnation, omitting schedules attached thereto	April 19, 1943
6.	Election to extend term for years	May 1, 1943
7.	Supplemental declaration of taking, omitting schedule attached thereto	August 23, 1943
8.	Judgment on supplemental declaration of taking	October 22, 1943
9.	Election to extend term for years	May 25, 1944
10.	Supplemental declaration of taking, omitting schedule attached thereto	August 2, 1944
11.	Judgment on declaration of taking	August 2, 1944
12.	Stipulation of agreed facts and issues of law, including exhibit attached thereto	
13.	Opinion	June 12, 1947
14.	Judgment as to Parcel A	November 24, 1947
15.	Notice of appeal	February 19, 1948
42 16.	Appellant's statement of points	February 24, 1948
17.	This designation	February 24, 1948

UNITED STATES OF AMERICA,
Appellant.

WILLIAM T. MCCARTHY,
United States Attorney.

By PHILIP P. A. O'CONNELL,
Special Assistant to the United States Attorney.

43 [Clerk's Certificate to foregoing transcript omitted in printing.]

[Memorandum: Order of enlargement of time for docketing case to, and including, April 29, 1948, is here omitted. Roger A. Stinchfield, Clerk.]

PROCEEDINGS IN COURT OF APPEALS

On October 4, 1948, this cause came on to be heard, and was fully heard by the Court, Honorable Calvert Magruder, Chief Judge, and Honorable Herbert F. Goodrich (by special assignment) and Honorable Peter Woodbury, Circuit Judges, sitting.

This cause was thence continued under advisement to the present term of October, in the year of our Lord one thousand nine hundred and forty-eight.

On November 23, 1948, the following opinion of the Court and dissenting opinion were filed:

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

October Term, 1948

No. 4353

UNITED STATES OF AMERICA, PETITIONER, APPELLANT

v.

WESTINGHOUSE ELECTRIC & MANUFACTURING CO., APPELLEE

Appeal from the District Court of the United States for the District of Massachusetts

[71 F. Supp. 1001]

Before MAGRUDER, Chief Judge, GOODRICH and WOODBURY, Circuit Judges

JOHN F. COTTER, Attorney, Department of Justice, with whom A. DEVITT VANECH, Assistant Attorney General, and WILLIAM T. MCCARTHY, United States Attorney, were on brief for appellant.

MILTON J. DONOVAN for appellee.

OPINION OF THE COURT

November 23, 1948

WOODBURY, *Circuit Judge*. This is an appeal by the United States from so much of a final judgment entered in proceedings brought for the condemnation of the temporary use and occupancy of a parcel

of land with the buildings thereon as awarded removal costs in the stipulated amount of $25,600 to Westinghouse Electric and Manufacturing Company, the lessee of a portion of the premises condemned. The question presented here was not directly considered by the Supreme Court in either *United States* v. *General Motors Corp.*, 323 U. S. 373, or in *United States* v. *Petty Motor Co.*, 327 U. S. 372. It is whether costs of removal may properly be considered as elements of a lessee's damage when the United States condemns the use and occupancy of leased premises for an original period less than the remainder of the lessee's term but with options to extend, and then exercises those options to prolong its use and occupancy beyond the lessee's term. The facts which give rise to this question have been stipulated.

On February 18, 1943, the United States filed a petition in the court below under the Second War Powers Act of March 27, 1942, 56 Stat. 176, 177, and other statutes, for the condemnation of certain warehouse property in Springfield, Massachusetts, part of which was occupied at the time by the Westinghouse Electric and Manufacturing Company under a lease expiring on October 30, 1944. The petition for condemnation recited "That the interest to be acquired is a term for years ending June 30, 1943, subject to existing easements . . ., said term being renewable for additional yearly periods during the existing national emergency at the election of the Secretary of War, which election shall be signified by the giving of notice at any time prior to the expiration of the term hereby taken or subsequent extensions thereof." The United States was granted immediate possession of the premises and Westinghouse moved to another location. The parties have stipulated that Westinghouse "in so doing incurred certain costs and expenses of removal of its personal property aggregating the sum of Twenty-Five Thousand, Six Hundred and 00/100 Dollars ($25,600.00) which it is agreed represents the full and complete claim for compensation of said lessee against the United States of America on behalf of, or arising under the lease of the Westinghouse Electric Corporation." It is further stipulated that had the parties proceeded to trial witnesses for Westinghouse would testify that the above amount was actually expended by it "for the cost and expenses of labor, material, and transportation in moving its property from the location in question to a new location," and that the expense incurred was necessary, fair and reasonable "for such removal."

On May 1, 1943, the Secretary of War exercised the right to renew the term of the taking to June 30, 1944, and on May 25, 1944, he exercised the right to renew the term to June 30, 1945, thereby extending the Government's occupation eight months beyond the expiration date of the Westinghouse lease. The United States deposited estimated just compensation for the original taking and for

each extension thereof in the gross amount of $121,045.78. It is stipulated that this amount "represents the fair market rental value of the bare unheated warehouse space taken and, if upon the facts and evidence agreed, if admissible, Westinghouse Electric Corporation is entitled to recover for the loss of its right to occupy under its lease as a matter of law, then a finding should be entered determining the just compensation to be in the sum of One Hundred Forty-Six Thousand, Six Hundred Forty-Five and 78/100 Dollars ($146,645.78), inclusive of interest, and an order be entered disbursing the sum of Twenty-Five Thousand, Six Hundred and 00/100 Dollars ($25,600.00) to Westinghouse Electric Corporation, and the sum of One Hundred Twenty-One Thousand, Forty-Five and 78/100 Dollars ($121,045.78), being the total amount of the deposits," to Westinghouse's lessor, the owner in fee.

It is further stipulated that no "factual matters" other than those agreed upon remain to be determined and that "the sole issue of law" which they present is whether Westinghouse is "entitled to recover from the United States of America the sum of Twenty-Five Thousand, Six Hundred and 00/100 Dollars ($25,600.00) as the value of its occupancy under the lease upon the foregoing facts and evidence?" The District Court, considering the *General Motors* case *supra*, controlling, entered judgment for Westinghouse in accordance with the stipulation and the United States thereupon took this appeal.

In the *General Motors* case the question considered by both the Circuit Court of Appeals [1] and the Supreme Court was whether the District Court had erred in excluding evidence of a lessee's costs of removal at the trial by jury of the issue of the amount of the lessee's just compensation in a condemnation case wherein the use condemned was for a period of one year and no more out of a lease having approximately six more years to run. Both courts answered this question in the affirmative, holding that under the circumstances presented actual, necessary and reasonable costs of removal might be proved by a lessee, not as independent items of damage, but as elements to be considered in determining the amount of the just compensation required by the Fifth Amendment, i.e. the price which would be willingly asked and paid for the temporary interest which the Government had condemned.

In reaching this result the Supreme Court was careful to point out that it approved, and was not to be taken as departing from, the general rule that consequential losses are "not to be reckoned as part of the compensation" due an owner when the fee is taken. It said the question posed in the case before it was "shall a different measure of compensation apply where that which is taken is a right of temporary occupancy of a building equipped for the condemnee's busi-

[1] 140 F. (2nd) 873.

ness, filled with his commodities, and presumably to be reoccupied and used, as before, to the end of the lease term on the termination of the Government's use?" *id.* 379, 380.

In answering this question in the affirmative the Supreme Court first pointed out that whenever the Government takes an owner's property "that is, the fee, the lease, whatever he may own, terminating altogether his interest, under the established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of 'consequential damage' as that conception has been defined in such cases." But the court goes on to say that "It is altogether another matter when the Government does not take his entire interest, but by the form of its proceeding chops it into bits, of which it takes only what it wants, however few or minute, and leaves him holding the remainder, which may then be altogether useless to him, refusing to pay more than the 'market rental value' for the use of the chips so cut off. This is neither the 'taking' nor the 'just compensation' the Fifth Amendment contemplates. The value of such an occupancy is to be ascertained, not by treating what is taken as an empty warehouse to be leased for a long term, but what would be the market rental value of such a building on a lease by the long-term tenant to the temporary occupier. The case should be retried on this principal." *id.* 382. Following this the court says that "Some of the elements which would certainly and directly affect the market price agreed upon by a tenant and a sublessee in such an extraordinary and unusual transaction would be the reasonable cost of moving out the property stored and preparing the space for occupancy by the subtenant," and consequently the court reaches its conclusion that "Such items may be proved, not as independent items of damage but to aid in the determination of what would be the usual—the market—price which would be asked and paid for such temporary occupancy of the building then in use under a long-term lease."

From the foregoing it seems evident that the Supreme Court based its conclusion in the *General Motors* case primarily, if not entirely, upon the fact that since the use condemned by the Government was for a period of only one year out of an unexpired lease of approximately six years, the ousted tenant was under the obligation of returning to, or at least was responsible for the rent for, the leased premises for the balance of the term of the lease remaining after the termination of the Government's use.

But in the *General Motors* case both the Circuit Court of Appeals and the Supreme Court adverted in footnotes of the fact that subsequent to the entry of the judgment appealed from, the District Court on the Government's motion had opened the judgment and allowed the Government to amend its petition for condemnation to enlarge the interest taken by making the original term for years expiring on a given date "renewable for additional yearly periods thereafter

. . . at the election of the Secretary of War" on the giving of a specified notice of intent to renew, and then had entered a new judgment in the amount of the verdict and had continued its jurisdiction for the ascertainment of further compensation for damage to the property, if any such damage should accrue. Thus, although the Supreme Court said that the amendment of the complaint in the above case did not alter the question the case presented, nevertheless it must have been well aware of the fact that in ordering the case retried on the principles which it was announcing, it was ordering the admission of evidence of a tenant's removal costs at the trial of a petition for condemnation which by amendment had become similar to the one in the case at bar with respect to the description of the interest taken, i.e., at the trial of a condemnation case in which the use taken by the Government, if renewed, might outlast the lessee's tenancy. From this we can only assume that the Supreme Court intended its decision in the *General Motors* case to rule the situation presented in the instant one.

Further confirmation for this view is to be found in the footnote in the above case already alluded to in which the Supreme Court refers to the amendment of the judgment appealed from. For, after saying that the amendment did not "alter the question" before it, and that "The case now presented involves only the original taking for one year," the court immediately goes on to say: "If, on the remand, the case be treated as involving the Government's option of renewal, the additional value of that interest must be included in the compensation awarded."

And we find nothing militating against this view in the opinion of the court in the *Petty Motor* case, *supra*. Indeed we find support for it in the concurring opinion in that case.

In the *Petty Motor* case the Supreme Court was confronted with the question of the admissibility of evidence of a lessee's costs of removal at the trial of a petition for condemnation whereby the Government had taken the use of certain premises through June 30, 1945, with the right to surrender them on either June 30, 1943, or June 30, 1944, upon giving the owner sixty days written notice, the first of these surrender dates being within the term of an outstanding lease of the premises and the second within the term of an option of renewal contained in the lease. In this situation the Supreme Court held that the rule it had announced in the *General Motors* case did not apply. It said that "Although an earlier surrender might occur by the election of the United States, the estate sought did not necessarily expire until June 30, 1945." p. 374. This, it concluded "resulted in the taking by the United States of the temporary use of the building until June 30, 1945," for, it continued, "When the shortening of the term is wholly at the election of the lessee, the term of the leasehold for the purpose of determining the extent of the taking

must be considered to be its longest limit." p. 375. Therefore it concluded that there had been "a complete taking of the entire interest of the tenants in the property" and then it said: "We think the sounder rule under the federal statutes is to treat the condemnation of all interests in a leasehold like the condemnation of all interests in the fee. In neither situation should evidence of the cost of removal or relocation be admitted. Such costs are apart from the value of the thing taken. They are personal to the lessee."

Then the court distinguished the *General Motors* case on the ground that "In it only a portion of the lease was taken," and, it continued "There is a fundamental difference between the taking of a part of a lease and the taking of the whole lease. That difference is that the lessee must return to the leasehold at the end of the Government's use or at least the responsibility for the period of the lease which is not taken rests upon the lessee. This was brought out in the *General Motors* decision. Because of that continuing obligation in all takings of t porary occupancy of leaseholds, the value of the rights of the lessees which are taken may be affected by evidence of the cost of temporary removal."

Taken together the two cases we have discussed and quoted from clearly establish that although a tenant's removal costs may never be proved "as independent items of damage," they must be considered "to aid in the determination" of the amount of just compensation which the Government under the Fifth Amendment must pay to a tenant when a part only of his leasehold interest is taken but are not to be considered when his entire interest is expropriated. The problem before us is to determine whether the Government in the case at bar took the tenant's entire interest or only a part of it. We have concluded that only part of the interest had been taken and thus we agree with the District Court that the rule of the *General Motors* case applies.

And Mr. Justice Rutledge concurring in the *Petty Motor* case takes the same view. After pointing out that in the *General Motors* case "the Court applied a rule of compensation to the case of carving out a temporary or short-term use from a longer term very different from that generally applicable when the owner's entire interest is taken," and that "The purpose and the basis for this were to give substance, in practical effect, to the Amendment's explicit mandate for payment of '*just* compensation' in cases of such extraordinary 'takings' and to prevent those words from being whittled down by legalistic construction into means for practical confiscation," he expresses doubts, but accepts, the Court's construction that in the *Petty Motor* case the Government condemned the tenant's "entire leasehold interest in the premises and therefore must pay the full value of that term according to the usual rules in such cases." Then he discusses the rule of the *General Motors* case and the rule adopted

by the court in the *Petty Motor* case, and referring to the Government's option to surrender in the latter case continues as follows:

> "It is this option which I think makes dubious the ruling that all of the Petty Motor Company's interest was 'taken.' In my opinion it was only 'taken' contingently. For, if the option is valid, quite obviously the Government was free to surrender, by giving notice, on June 30, 1943, in which event Petty's lease would have been in force until the following October 31 in any event, or on June 30, 1944, in which case Petty's lease might have continued in force until October 31, 1944. In either event the case would have fallen squarely within the *General Motors* situation and ruling.
>
> "In my opinion that ruling and the requirement of paying compensation according to the measure it prescribes apply whether the Government carves out part of the tenant-owner's term by one method of stating what it takes or another. That is, for this purpose, it makes no difference whether the Government 'takes' the temporary use for part of the term but adds to this a right of renewal periodically which if exercised will extend the term taken beyond the term of the lease; or, on the other hand, purports to take a term which extends beyond that of the leasehold interest, but reserves the right to cut this down periodically so that in fact it may surrender the premises before the leasehold expires and thus carve out of it a shorter term, just as in the *General Motors* taking.
>
> "Whether the chopping up is accomplished one way or the other, the effects for the owner are the same, the 'taking' is in substance the same, and the compensation is required, under the *General Motors* decision, to be the same. That ruling cannot be avoided by inverting the length of the term specified and, correlatively, the character of the option added. Nor can it be avoided by construing the term taken, in view of the contingent option, in cases of the Petty type as including all of the interest of the lessee, if in fact the Government exercises the option and surrenders the premises before the lessee's term expires. Upon such a showing the *General Motors* rule would apply and the owner-lessee would be entitled to recover compensation including all of the elements specified in that rule, subject only to making proof of them."

The foregoing analysis seems to us to indicate that the rule of the *General Motors* case applies when the Government has described the interest which it is taking as a term for years annually renewable at its option. In applying it, however, we recognize that the way is now open for the Government to avoid any possibility of liability for removal costs by the simple expedient of "chopping up" the tenant's

interest as it did in the *Petty Motor* case rather than as it did in the *General Motors* case. Perhaps, since in all cases wherein the Government takes a temporary use for an indefinite period the district court having jurisdiction must of necessity retain its jurisdiction until the actual termination of the Government's use in order finally to determine the whole amount of damage incurred, the problem could be solved by directing the district courts to hold the question of removal costs as elements of a tenant's damage in abeyance until final judgment so that they could be considered or disregarded depending upon whether in fact the Government's use did or did not outlast the tenant's lease. But we find no sanction for this procedure in either of the Supreme Court cases considered, and this omission we think highly significant.

The judgment of the District Court is affirmed.

MAGRUDER, *Chief Judge*, (dissenting). The teaching of *United States* v. *General Motors Corp.*, 323 U. S. 373 (1945), and *United States* v. *Petty Motor Co.*, 327 U. S. 372 (1946), may perhaps not be entirely clear. But it seems to me that the logical inference from those decisions points to the opposite conclusion from that arrived at in the opinion of the court in the case at bar.

Where the United States takes the entire fee in condemnation proceedings, the settled rule as to just compensation for the interest taken is stated in the *General Motors* case as follows (323 U. S. at 379-80):

> "The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, the loss of goodwill which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign. No doubt all these elements would be considered by an owner in determining whether, and at what price, to sell. No doubt, therefore, if the owner is to be made whole for the loss consequent on the sovereign's seizure of his property, these elements should properly be considered. But the courts have generally held that they are not to be reckoned as part of the compensation for the fee taken by the Government. We are not to be taken as departing from the rule they have laid down, which we think sound."

Likewise, where the taking is of a term for years which completely extinguishes an existing leasehold interest, it is error to admit evidence by the tenant of his costs of moving and reinstallation of equipment on the issue as to the amount of compensation payable to him. *United States* v. *Petty Motor Co.*, *supra*. In such a case

the measure of compensation is the value of the use and occupancy of the leasehold for the remainder of the tenant's term, less the amount of the rent which the tenant agreed to pay for such use and occupancy. 327 U. S. at 381.

An exceptional situation is presented where the Government takes a term for years for a period less than the unexpired portion of an existing leasehold. As to the appropriateness here of receiving evidence of the tenant's removal expenses, the tenant in its brief in the *General Motors* case urged upon the Supreme Court this equitable consideration: "As the situation in this case actually stands, however, the condemnation for the temporary use of only one year means that, instead of moving out once and for all, in 1942 rather than six years later, respondent is obliged, by force of its obligation for the balance of the lease term, to move back again in order to reoccupy the property upon termination of the Government's temporary use, and then move out again several years later by reason of the expiration of the lease." That this seems definitely to have been the moving consideration in the *General Motors* decision appears from the explanation of that case in *United States* v. *Petty Motor Co.*, 327 U. S. at 379-80.

In the present case the United States filed a single petition for condemnation describing the interest to be acquired as a term for years ending June 30, 1943, said term being renewable upon notice for additional yearly periods during the existing national emergency at the election of the Secretary of War. Of necessity, in such a condemnation proceeding, the final determination of the just compensation must abide the event, because until it is known whether and to what extent the Government's option to renew is to be exercised, the extent of the ultimate taking under the condemnation petition cannot be known. Here, before the court below entered the judgment now under review, the United States by exercise of its option of renewal had extended the term of the taking beyond the remaining period of Westinghouse's lease. It thus conclusively appeared that Westinghouse would not have the burden of moving out during the period of the Government's temporary occupancy and then moving back for the balance of the term of its leasehold—which, as we have seen, was the important factor in the *General Motors* case. Therefore it seems to me that, at the time the district court gave judgment here, the case stood just as if the Government had originally taken a term for a period expiring June 30, 1945, which was longer than the unexpired portion of Westinghouse's lease. *United States* v. *Petty Motor Co.* is authority for the point that in such a case evidence of the tenant's removal costs is inadmissible on the issue of the value of the tenant's leasehold interest extinguished by the taking.

In the *General Motors* case, the original petition for condemnation was for a term of a year only. The case was tried on this basis in the

district court, and evidence of the tenant's removal expenses was excluded. The case was argued in the circuit court of appeals and in the Supreme Court on the same basis, and both appellate courts held that the trial court was in error in excluding evidence of removal costs. The case therefore had to go back for a new trial. It is true, as both appellate courts noted, that after the district court had entered judgment on the verdict it allowed the Government to amend its petition for condemnation so as to add an option of renewal for additional yearly periods at the election of the Secretary of War. But it does not appear from the record in the *General Motors* case whether the Government ever exercised its option to extend the term beyond the one year originally taken. For all we know, it never did; and if that is what happened, then the district court upon the retrial would have been obliged to receive evidence of the tenant's costs of removal as directed by the Supreme Court. But if, after the remand, it should have appeared that the Government had exercised its option of renewal and was still in possession, I suppose the issue of compensation to General Motors would have stood in abeyance until it was determined whether the United States was going to stay in possession beyond the remaining portion of General Motors' lease. And if the fact was at the time of the retrial that the taking by the United States had completely extinguished the leasehold interest of General Motors, then the decision in *United States* v. *General Motors Corp.*, *supra*, as to admissibility of evidence of removal costs, was no longer controlling, for it was directed to quite a different situation. Cf. Rutledge, J., concurring, in *United States* v. *Petty Motor Co.*, *supra*.

One further consideration is puzzling to me. Where the United States condemns a term for a period less than the unexpired portion of an existing leasehold, the decision in the *General Motors* case does not say that the tenant is entitled to removal expenses as an independent item of damage, but only that evidence of such removal expenses is admissible "to aid in the determination of what would be the usual—the market—price which would be asked and paid for such temporary occupancy of the building then in use under a long-term lease." (P. 383.) How much this factor might affect such market value is somewhat conjectural, but presumably it would be taken into account by an expert appraisal. When the United States takes, not a fixed term merely, but a term of a year with the option of renewal for successive annual terms, the tenant cannot know at the time of the original taking whether the condemnation proceeding will ultimately extinguish the whole of his unexpired leasehold, or whether he will be faced with the situation of the tenant in the *General Motors* case, namely, the taking of only a portion of the leasehold interest, putting the tenant to the necessity of moving out during the temporary period of Government occupancy and moving back for the remaining period of the leasehold after the Government

has relinquished possession. Therefore, it might be suggested that, in the case at bar, the matter should be looked at as of the time of the original taking; that the *chance* of having to move back would be a factor bearing on the rental which a willing sublessor and a willing sublessee would agree upon for a sublease of this indefinite duration; and hence that evidence of removal costs should be admissible on the issue of just compensation for the interest taken, regardless of whether the Government, by successive renewals, ultimately extinguishes the whole interest of the tenant. But this suggestion runs counter to what was actually done in *United States* v. *Petty Motor Co., supra*. In that case, the Government's petition for condemnation was for a term of years expiring June 30, 1945, reserving to the Government the right of election to surrender possession on June 30, 1943, or June 30, 1944, upon giving sixty days' written notice. At the time of the taking, Petty Motor Company held a lease on the premises expiring October 31, 1943, with an option for an additional year. At the time of the original taking, therefore, the tenant could not know whether the Government was going to occupy the premises for the full unexpired period of the tenant's lease, or whether the Government by exercise of its surrender option was going to relinquish possession while a portion of the tenant's leasehold was still unexpired. It does not appear what the Government ultimately did in that respect. Nevertheless, the Supreme Court held that it was error for the trial court to receive evidence of the tenant's costs of moving and reinstallation of equipment on the issue of the value of the interest taken.

I think it is fair to say that neither my brethren nor I have complete confidence that we have drawn the correct inferences from the *General Motors* and *Petty* cases in aid of the contrary conclusions we have reached in our respective opinions. For that reason, it would not be unwelcome if the Supreme Court found an early occasion to review the whole matter.

PROCEEDINGS IN COURT OF APPEALS

On the same day, November 23, 1948, the following judgment was entered:

JUDGMENT

November 23, 1948

This cause came on to be heard on the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

(S.) ROGER A. STINCHFIELD, *Clerk*.

Thereafter, on December 9, 1948, mandate issued.

42

55

Clerk's Certificate

I, Roger A. Stinchfield, Clerk of the United States Court of Appeals (formerly Circuit Court of Appeals) for the First Circuit, certify that the foregoing pages, numbered 1 to 61, inclusive, contain and are a true copy of the record and all proceedings in said Court to and including February 15, 1949, in the cause numbered and entitled, No. 4353, United States of America, Petitioner, Appellant, versus Westinghouse Electric & Manufacturing Co., Appellee.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Court of Appeals for the First Circuit, at Boston, Massachusetts, in said First Circuit, this fifteenth day of February, A. D. 1949.

[Seal] Roger A. Stinchfield, *Clerk*.

Supreme Court of the United States

Order allowing certiorari.

Filed April 18, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

INDEX

CITATIONS

Cases:

825045—49

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 574

UNITED STATES OF AMERICA, PETITIONER

v.

WESTINGHOUSE ELECTRIC & MANUFACTURING CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered on November 20, 1948, by the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the district court (R. 35–37) is reported *sub nom. United States* v. *Two Parcels of Land*, 71 F. Supp. 1001. The opinions of the court of appeals (R. 44–55) are reported at 170 F. 2d 752.

JURISDICTION

The judgment of the court of appeals was entered November 23, 1948 (R. 54–5). The jurisdic-

tion of this Court is invoked under 28 U. S. C. sec. 1254 (1).

QUESTION PRESENTED

Whether, when the United States condemns the use of leased property for an initial period less than the remainder of the lessee's term but with options in the Government to extend, and these options are exercised so as to extend Government occupancy beyond the lessee's term, there is a taking of the entire lease and consequently no liability to make compensation on account of the lessee's expense in moving personal property from the premises.

STATEMENT

The facts of this case, as stipulated by the parties (R. 28–31), may be summarized as follows:

On February 18, 1943, the United States filed a petition to condemn property in Springfield, Massachusetts, for a term ending the following June 30, "renewable for additional yearly periods during the existing national emergency at the election of the Secretary of War * * *." Immediate possession was granted, and on May 1, 1943, notice was given that the Secretary had elected to extend the term to June 30, 1944. A similar notice was given May 25, 1944, extending the term to June 30, 1945. (R. 28–29.)

In April 1943, the United States deposited the sum of $18,654.58 as just compensation for the

term extending from February 18, 1943, to June 30, 1943, and, in May 1943 and May 1944, it deposited sums of $51,195.60 as just compensation for each of the annual extensions (ending June 30, 1945) (R. 29). It is agreed that these deposits, totalling $121,045.78 (R. 31), represent the fair market value of the bare unheated warehouse space for a term extending from February 18, 1943, to June 30, 1945 (R. 30).

At the time of taking, the Hodges Carpet Company owned the property, a portion of which was occupied by Westinghouse Electric & Manufacturing Co. under a lease expiring October 30, 1944 (R. 29, 32–5). Westinghouse surrendered possession to the United States shortly after February 18, 1943, and spent $25,600.00 in moving its personal property to a new location. It was stipulated that had the parties proceeded to trial witnesses for Westinghouse would testify that such amount was actually expended for labor, materials and transportation, that such expense was necessary, fair and reasonable, and it was agreed that the $25,600.00 amount represented the full and sole claim of Westinghouse to compensation (R. 29–30).

Upon these facts, judgment was entered, on November 24, 1947, for Westinghouse in the sum of $25,600 (R. 37–39),[1] and upon appeal this judg-

[1] The opinion on which the judgment was based was entered on June 12, 1947 (R. 35–37).

ment was affirmed, Chief Judge Magruder dissenting (R. 51–54). The district judge (R. 35–37) and the majority of the Court of Appeals thought that the rule laid down in this Court's decision in *United States* v. *General Motors Corp.*, 323 U. S. 373, was controlling. Chief Judge Magruder, however, took the view that this case was governed by the decision in *United States* v. *Petty Motor Co.*, 327 U. S. 372.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that respondent's expenses of removal from the premises, on which its lease expired on October 30, 1944, could be considered in determining just compensation to respondent for the taking of its leasehold, where the taking was for a term ending June 30, 1943, and also provided for additional yearly periods during the national emergency at the Government's option, and these options were actually exercised so as to extend the Government's term to June 30, 1945.

2. In holding that in these circumstances respondent was entitled to an award based on the costs of removing its personal property from the location in question to a new location.

3. In affirming the District Court's entry of judgment in favor of respondent.

REASONS FOR GRANTING THE WRIT

1. In *United States* v. *Petty Motor Co.*, 327 U. S. 372, this Court held that the rule applicable when fee title is condemned—that in determining just compensation consideration may not be given to the expense of moving removable fixtures and personal property from the premises[2]—likewise applies when, in the case of condemnation of a term for years, all of a tenant's interest is taken. The exceptional rule of *United States* v. *General Motors Corp.*, 323 U. S. 373, applies only when less than the tenant's entire interest is taken. The reason for the distinction was explained in the *Petty Motor* decision as follows (pp. 379–380):

> There is a fundamental difference between the taking of a part of a lease and the taking of the whole lease. That difference is that the lessee must return to the leasehold at the end of the Government's use or at least the responsibility for the period of the lease which is not taken rests upon the lessee. This was brought out in the *General Motors* decision. Because of that continuing obligation in all takings of tem-

[2] The normal rule is, of course, that "evidence of loss of profits, damage to good will, the expense of relocation and other such consequential losses are refused in federal condemnation proceedings." *United States* v. *Petty Motor Co.*, 327 U. S. 372, 377–8; *Mitchell* v. *United States*, 267 U. S. 341, 344; *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 281; *United States* v. *General Motors Corp.*, 323 U. S. 373, 382.

porary occupancy of leaseholds, the value of the rights of the lessees which are taken may be affected by evidence of the cost of temporary removal.

Since the burden of establishing a right to compensation rests upon the condemnee (*United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266; *United States* v. *John J. Felin & Co., Inc.,* 334 U. S. 624, 631; *John Hancock Mut. Life Ins. Co.* v. *United States,* 155 F. 2d 977, 978 (C. A. 1); *United States* v. *Brooklyn Union Gas Co.,* 168 F. 2d 391, 398 (C. A. 2)), it was incumbent upon respondent to show that its claim came within the *General Motors* exception to the rule excluding consideration of removal costs, by proving that it was obligated to return to the leased premises at the end of the Government's use, or that responsibility for any period of the lease not taken rested upon it. No such showing was attempted, and respondent even made no claim to be compensated for the rent reserved. And, in fact, it was clear at the time of trial that the period of respondent's lease had terminated (on October 30, 1944) during the Government's occupancy, so that respondent could neither be compelled to resume any obligations, nor choose to avail itself of privileges, under the lease.

Thus, the position of the respondent is no different in substance from that of the *Petty Motor Co.,* and no reason appears why it should have

greater rights. There is no suggestion that its expenses of removal were any greater than they would have been if its entire term had initially been taken, and the parties' stipulation indicates that the contrary is true (R. 29–30, 31). There would seem to be no practical difference whether the duration of the Government's term depends upon an option to cancel as in the *Petty* case, or upon an option to renew as in the instant case. The result of the decision below would make consideration of removal expenses depend upon the form of words used to describe the interest taken by the Government. The distinction rests, we submit, not upon the form of words used, but upon the actual fact whether the Government occupies the premises for the entire remaining term of the lease.

The majority of the Court of Appeals thought that the rule of the *General Motors* decision was controlling because of the fact, stated in footnote 3 of that opinion, 323 U. S. at p. 376, that after judgment the condemnation petition in that case had been amended to include a right of renewal. But there was no showing that the Government had exercised this right,[3] and no discussion of what the result might be if renewals had actually extended the Government's occupancy beyond the lessee's term. In the *Petty Motor* opinion it

[3] See Rutledge J., concurring in the *Petty Motor* case, 327 U. S. at 383, and Magruder C. J., dissenting below (R. 53).

was pointed out, footnote 3, 327 U. S. at p. 375, that the *General Motors* case, in this Court, involved simply the original taking for one year. And we see no reason to believe, as does the majority below (R. 51), that either *General Motors* or *Petty* shows hostility to a district court's holding the matter of removal costs in abeyance until final judgment in the condemnation proceeding, so that these costs "could be considered or disregarded depending upon whether in fact the Government's use did or did not outlast the tenant's lease" (R. 51). However, the problem of holding the matter open is not necessarily involved here, for at the time of trial the Government's occupancy had already exceeded the full term of respondent's lease.

2. Since application of the distinction between the *General Motors* and *Petty Motor* cases substantially affects the compensation payable for taking of temporary interests, it is important that the matter be finally determined by this Court, particularly as a guide to future proceedings.[4] While the war with its multitude of such takings has ended, there are still many instances

[4] Cf. Magruder C. J., dissenting below (R. 54): "I think it is fair to say that neither my brethren nor I have complete confidence that we have drawn the correct inferences from the *General Motors* and *Petty* cases in aid of the contrary conclusions we have reached in our respective opinions. For that reason, it would not be unwelcome if the Supreme Court found an early occasion to review the whole matter."

in which property is needed for temporary Government use but not as a permanent installation, and the problem presented in this case will probably recur constantly. Thus, because of the current shortage of office space, proceedings to condemn temporary use have recently been brought to provide quarters for the administration of the Social Security Act (*United States* v. *Midland Nat. Bank of Billings*, 67 F. Supp. 268 (D. Mont.)), and for other governmental uses. A number of wartime cases, involving this question, also remain.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

FEBRUARY 1949.

U. S. GOVERNMENT PRINTING OFFICE: 1949

INDEX

CITATIONS

Cases:

Cases—Continued Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 26

UNITED STATES OF AMERICA, PETITIONER

v.

WESTINGHOUSE ELECTRIC & MANUFACTURING CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 25-26) is reported *sub nom. United States* v. *Two Parcels of Land*, 71 F. Supp. 1001. The opinions of the Court of Appeals (R. 31-41) are reported at 170 F. 2d 752.

JURISDICTION

The judgment of the Court of Appeals was entered on November 23, 1948 (R. 41). The petition for a writ of certiorari was filed on February 18, 1949, and was granted on April 18, 1949 (R.

43). The jurisdiction of this Court rests on 28 U.S.C. sec. 1254(1).

QUESTION PRESENTED

Whether, when the United States condemns the use of leased property for an initial period less than the remainder of the lessee's term but with options in the Government to extend, and these options are exercised so as to extend the Government occupancy beyond the lessee's term, there is a taking of the entire lease and consequently no liability to make compensation on account of the lessee's expenses in moving personal property from the premises.

STATEMENT

The United States instituted this proceeding on February 18, 1943, by filing its petition to condemn property in Springfield, Massachusetts, for war purposes. The interest taken was described as "a term for years ending June 30, 1943 * * * said term being renewable for additional yearly periods during the existing national emergency at the election of the Secretary of War, which election shall be signified by the giving of notice at any time prior to the expiration of the term hereby taken or subsequent extensions thereof;" (R. 2). Immediate possession was granted on the same day (R. 4-5) and on May 1, 1943, notice of election to extend the term to June 30, 1944, was filed (R. 11-12). On May 25, 1944, a similar notice was given extending the term to June 30,

1945 (R. 15). On April 16, 1943, a declaration of taking was filed, and estimated compensation of $19,192.43 for the original term was deposited in court (R. 5-8). In 1943 and 1944 supplemental deposits were made, the compensation for each yearly extension being estimated at $51,195.60 (R. 20).

At the time the proceedings were instituted, the Hodges Carpet Company was the owner of the property. The Westinghouse Electric Company occupied a portion of the premises under a lease dated January 19, 1942, for a term expiring October 30, 1944.

All parties joined in a stipulation of the facts filed May 27, 1947. In addition to the facts already stated, it was agreed as follows (R. 20-22):

In compliance with the order of immediate possession Westinghouse removed from the premises, incurring costs and expenses of $25,600 in moving personal property. If trial had been held upon its claim, witnesses would have testified that $25,600.00 had been expended in moving the personal property, that this was necessary and a fair and reasonable expenditure, and that the market rental value of the portion of the premises occupied by Westinghouse on a sub-lease given by it as long term tenant to a temporary occupier was $25,600 above the rent reserved, i.e., the removal cost. The admissibility of such evidence was reserved for determination by the court. Westinghouse waived any claim other than its demand for $25,600, and it was

stipulated that the deposits previously made, which totalled $121,045.78, represented the fair market rental value of the bare unheated warehouse space taken. The parties agreed that, if Westinghouse was entitled to recover the $25,600.00, judgment should be entered against the United States for $146,645.78 inclusive of interest, of which $25,600 should be distributed to Westinghouse and the remaining $121,045.78 to Hodges Carpet Company. If Westinghouse's claim was rejected, then judgment should be entered for $121,045.78 which should be distributed to Hodges Carpet Company. The legal issue as to whether the $25,600 was recoverable by Westinghouse was submitted to the court.

The district court, in an opinion entered June 12, 1947, concluded that Westinghouse was entitled to recover (R. 25-26), and an appropriate judgment was entered on November 24, 1947 (R. 26-28). The Court of Appeals affirmed, Chief Judge Magruder dissenting (R. 31-41). The district judge and the majority of the Court of Appeals thought that the rule laid down in this Court's decision in *United States* v. *General Motors Corp.*, 323 U.S. 373, was controlling. Chief Judge Magruder, however, took the view that this case was governed by the decision in *United States* v. *Petty Motor Co.*, 327 U.S. 372.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that respondent's expenses of removal from the premises, on which its lease ex-

pired on October 30, 1944, could be considered in determining just compensation to respondent for the taking of its leasehold, where the taking was for a term ending June 30, 1943, and also provided for additional yearly periods during the national emergency at the Government's option, and these options were actually exercised so as to extend the Government's term to June 30, 1945.

2. In holding that in these circumstances respondent was entitled to an award based on the costs of removing its personal property from the location in question to a new location.

3. In affirming the district court's entry of judgment in favor of respondent.

SUMMARY OF ARGUMENT

The sole question here is whether evidence of the expenses incurred by Westinghouse in moving from the premises was admissible, it being agreed that absent that element the rental value of the portion of the premises occupied by Westinghouse did not exceed the amount payable under its lease.

Evidence of that character is not ordinarily admissible either when the Government takes fee title or where it takes temporary occupancy for a period longer than that of existing leases. In the latter case, such taking merely accelerates the lessee's term, and his removal costs are incurred sooner by reason of the taking. They would have been incurred in any event, regardless of the taking, and are not compensable. The only exception to this

rule is represented by *United States* v. *General Motors Corp.*, 323 U.S. 373, permitting consideration of the tenant's removal costs where the taking was shorter than the remaining lease term. That exception has no application to the instant case.

A. This Court's decisions in *United States* v. *Petty Motor Co.*, 327 U.S. 372, and *Kimball Laundry Company* v. *United States*, 338 U. S. 1, made it clear that the exceptional rule of the *General Motors* case was based upon the fact that, after the Government vacated the premises, the lessee was obliged to return thereto or at least was obligated for the remainder of the lease term. Westinghouse, which had the burden of proving the facts establishing its right to compensation, did not and could not establish the existence of any such obligation, since its lease expired in October 1944, and Government occupancy continued until June 30, 1945. Since Westinghouse was not subjected to any greater expense than it would have had to bear upon expiration of its lease by lapse of time, the exceptional rule of the *General Motors* case does not apply.

B. Factually, there is no substantial difference between this case and the *Petty Motor* case, where the interest taken was described as a term for three years which could be cut short at the end of one or two years. The difference between such an interest and a short term subject to extension upon the Government's option, the type of taking described in the instant case, is purely formal and does not lead

to application of a different measure of compensation. And even if there were a distinction between the two forms of taking, the difference would be irrelevant here, since respondent's term admittedly expired before the end of the Government's use, and it was not obliged to return to the premises and suffered no actual loss or dislocation because of an obligation for a remainder of its lease.

C. Respondent is not being deprived of a vested right to have moving costs considered, which came into being on the date of taking. While the right to compensation vested at the date of taking, the applicability of the *General Motors* case, and hence, the admissibility of evidence to measure compensation, necessarily depended upon events which might occur later. The cases in the field of eminent domain valuation, as well as in other areas of the law of valuation and damages, make it plain that there is no rule prohibiting courts from looking to events occurring after the date of taking in order to ascertain the true facts. Respondent has no cause to complain that the facts known to exist at the time of trial are considered. Although no such question is presented by this case, since the trial took place after it was known that respondent's entire lease interest had been taken, no reason appears why trial could not be postponed if, at the time the case would otherwise be reached for trial, it is not known whether the tenant will be obligated to return to the premises when the Government vacates. Removal costs may be considered only if that obligation exists.

ARGUMENT

Respondent Is Not Entitled to an Award for Its Condemned Leasehold Based Upon a Consideration of Its Removal Expenses

In the stipulation, respondent waived any claim except for $25,600, and agreed that if evidence of expenses of removing its personal property from the premises was not admissible, the entire award should be paid to the fee owner (R. 20-21). It is not contended, for instance, that the current rental value of the warehouse space Westinghouse occupied exceeded the amount of rent due under its lease for such space, nor is any claim made that Westinghouse was entitled to recover such rental value and in turn pay it over to the fee owner. Cf. *John Hancock Mut. Life Ins. Co.* v. *United States*, 155 F. 2d 977, 978 (C. A. 1). It is further stipulated that witnesses for Westinghouse would have testified that the market rental value of its space "on a sublease which would be given by it as long-term tenant to a temporary occupier over and above the rent reserved under its lease, was the sum of Twenty Five Thousand, Six Hundred and 00/100 Dollars ($25,600.00), being its removal cost to make the property available to the temporary occupier", and that if Westinghouse's evidence were admissible, the $25,600.00 should be included in the total compensation owing by the Government (R. 21). Thus, the sole question is whether evidence of cost of removal was admissible in the determination of just compensation for the taking of the leasehold.

It is well-settled that such evidence is not ordinarily admissible in eminent domain cases. As this Court said in *United States* v. *General Motors Corp.*, 323 U.S. 373, 379:

> The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, *the expense of moving removable fixtures and personal property from the premises,* the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign. No doubt all these elements would be considered by an owner in determining whether, and at what price, to sell. No doubt, therefore, if the owner is to be made whole for the loss consequent on the sovereign's seizure of his property, these elements should properly be considered. But the courts have generally held that they are not to be reckoned as part of compensation for the fee taken by the Government. We are not to be taken as departing from the rule they have laid down, which we think sound (Italics supplied).

The same rule applies when, in the case of condemnation of temporary occupancy rather than fee title, the occupancy taken by the United States extends beyond the term of existing leaseholds. In *United States* v. *Petty Motor Co.*, 327 U.S. 372, this Court said (p. 378):

> We think the sounder rule under the federal statutes is to treat the condemnation of all in-

terests in a leasehold like the condemnation of all interests in the fee. In neither situation should evidence of the cost of removal or relocation be admitted.

The *General Motors* case—permitting consideration of the lessee's removal costs where the Government did not take the lessee's entire term—represents the only exception to this well-settled rule. We think it clear that that exception has no application to the present case.

A. *Since respondent's entire term was ultimately taken pursuant to the condemnation petition, the exceptional rule of the General Motors decision, which rests on the fact of a partial taking, does not apply here.*—The *General Motors* decision held that evidence of the lessee's removal expenses was admissible in a case where the Government's temporary taking was of shorter duration than the term of the existing lease. As that case was decided in this Court, it involved a one-year taking, in 1942, of warehouse space on which the General Motors Corporation held a twenty-year lease (1928-1948) with six years left to run. 323 U. S. at 375. At the end of the Government's year of occupancy, the company would again be responsible for the premises, and would either have to resume use of the warehouse by returning its property or equipment, make some other useful disposition of the space, or suffer the loss of the annual rentals it would continue to be obligated to pay to the owner. It was in these circumstances that the Court permitted the

tenant to prove its removal costs as an aid to the determination of the just compensation to be awarded it for the "chopping up" of its interest, taking only a part and leaving it holding the remainder, "which may then be altogether useless to [it]," 323 U. S. at 382-383. The reason for this exception was explained in the *Petty Motor* decision as follows (pp. 379-380):

> There is a fundamental difference between the taking of a part of a lease and the taking of the whole lease. That difference is that the lessee must return to the leasehold at the end of the Government's use or at least the responsibility for the period of the lease which is not taken rests upon the lessee. This was brought out in the *General Motors* decision. Because of that continuing obligation in all takings of temporary occupancy of leaseholds, the value of the rights of the lessees which are taken may be affected by evidence of the cost of temporary removal.

More recently, in *Kimball Laundry Company* v. *United States*, 338 U. S. 1, it was stated—in reference to the difference in the lessee's obligation at the end of the Government's occupation—that the line between the two cases "is likewise based on a recognition of a difference in the degree of restriction of the condemnee's opportunity to adjust himself to the taking."

Since the burden of establishing a right to compensation rests upon the condemnee (*United States*

ex rel. T. V. A. v. *Powelson*, 319 U. S. 266; *United States* v. *John J. Felin & Co., Inc.*, 334 U. S. 624, 631; *John Hancock Mut. Life Ins. Co.* v. *United States*, 155 F. 2d 977, 978 (C.A. 1); *United States* v. *Brooklyn Union Gas Co.*, 168 F. 2d 391, 398 (C.A. 2)), it was incumbent upon respondent to show that its claim came within the *General Motors* exception to the rule excluding consideration of removal costs, by proving that it was obligated to return to the leased premises at the end of the Government's use, or that responsibility for any period of the lease not taken rested upon it. No such showing was attempted, and respondent made no claim to be compensated for the rent reserved. And, in fact, it was clear at the time of trial (May 1947) that the period of respondent's lease had terminated (on October 30, 1944) during the Government's occupancy, so that respondent could neither be compelled to resume any obligations, nor choose to avail itself of privileges, under the lease.

In the *Petty Motor* decision, this Court held that when all of the interest of a lessee is taken the rule applicable when the fee is condemned applies, stating (pp. 378-379): "The lessee would have to move at the end of his term unless the lease was renewed. The compensation for the value of the leasehold covers the loss from the premature termination except in the unusual situation where there is a higher cost for present relocation than for a fu-

ture."[1] Respondent is in precisely the same situation. Its removal from the premises was simply accelerated some twenty months.[2] Respondent made no attempt to show that its expenses of removal were any greater than they would have been at the time the lease expired (see R. 20-22). It follows that evidence of removal costs was not admissible here.

B. *Application of the exceptional rule of the General Motors case depends not upon the form of words used by the Government in taking the lessee's interest but on the substance of the taking.* —The majority opinion of the court below recognized that the *General Motors* decision was based primarily, if not entirely, on the fact that the tenant was under an obligation to return to the premises after termination of the Government's use (R. 34). It did not conclude that Westinghouse was under any such obligation. Nevertheless, it held that this case was controlled by the *General Motors* decision, recognizing that its conclusion rested simply on the form of words used by the

[1] This ruling was foreshadowed in the *General Motors* opinion, in which the Court pointed out that consequential damages, including removal costs, are not payable when the Government "takes the property, that is, the fee, the *lease*, whatever he may own, *terminating altogether his interest* . . ." 323 U. S. at 382 (italics supplied).

[2] Respondent's lease did not give it any option to renew its tenancy (R. 22-25), and the *Petty Motor* case explicitly holds that the possibility of renewal by mutual agreement does not add anything to the tenant's rights or permit it to prove costs of moving or relocation which would otherwise be inadmissible. 327 U. S., at 380.

Government in taking the property, and that "the way is now open for the Government to avoid any possibility of liability for removal costs by the simple expedient of 'chopping up' the tenant's interest as it did in the *Petty Motor* case rather than as it did in the *General Motors* case" (R. 37-38). We submit, however, that the significant difference between the rules of the two cases does not rest simply upon the form of words that the Government officer might employ, but rather upon the fact whether the tenant was actually obligated under his lease to return to the premises at the end of the Government's occupancy. Cf. *Helvering* v. *Hallock*, 309 U. S. 106.

1. The majority of the Court of Appeals thought that the *General Motors* rule governs here because, after the just compensation judgment had been originally entered in that case, the District Court, on the Government's motion, opened the judgment and permitted the Government to amend its petition for condemnation to include a right of indefinite yearly renewals at the election of the Secretary of War. 323 U. S. at 376, fn. 3. In the *Petty* case, on the other hand, the Government took the building for use from November 1942 through June 30, 1945, with the right of election in the United States to surrender the premises on June 30, 1943, or June 30, 1944, upon sixty days' written notice to the owner. 327 U. S. at 374. It is this formal distinction in the terms of taking, rather than the events

which actually occurred, which the Court of Appeals stresses.

But it is quite clear that the *General Motors* opinion dealt only with the initial taking for one year, and did not consider the added renewal option, or purport to lay down any rule as to the admissibility of removal expenses where a renewal option has been exercised so as to extend the Government's occupancy beyond the term of the condemnee-tenant's lease. After briefly adverting to the post-judgment amendment of the condemnation petition to include the option, Mr. Justice Roberts stated for the Court:

> We do not understand that these facts alter the question before us. The case now presented involves only the original taking for one year [323 U. S. at 377, fn. 3].[3]

In the *Petty Motor* opinion it was also pointed out (fn. 3, 327 U. S., at 375) that the *General Motors* case, in this Court, involved simply the original taking for one year. Indeed, there was no showing in the earlier case that the Government had ever exercised its option. Cf. Mr. Justice Rutledge, concurring in the *Petty* case, 327 U.S. at 383, and Magruder, C. J., dissenting below, R.

---

[3] The Court of Appeals, in the *General Motors* case, which took the same view as this Court, said as to the addition of the renewal option: "We do not understand, however, that this amended petition has any bearing upon the issues before the court below or here." 140 F. 2d 873, at 874, fn. 1.

40.[4] It is thus plain that the *General Motors* decision did not hold that if the Government's occupancy were extended beyond the term of the lease the exceptional rule permitting introduction of evidence of removal expenses would nevertheless apply.[5] And the later *Petty Motor* decision made it clear that the exceptional rule is inapplicable when the tenant is not obligated to return to the premises after the Government's occupancy terminates. *Supra*, pp. 10-13; *infra*, pp. 17-18.

2. Respondent seeks to support the decision below on the ground that under the form of words used in the *Petty Motor* case the lessee is freed of all obligation to move back if there is an early termination of the Government's occupancy, while

---

[4] The *General Motors* record (Oct. Term 1944, No. 76) does not indicate whether the Government's occupancy was actually extended or not. The briefs of the parties in this Court discuss the matter as if it involved only the original one-year taking.

[5] There is nothing to the contrary in the Court's statement that "If, on remand, the case be treated as involving the Government's option of renewal, the additional value of that interest must be included in the compensation awarded." 323 U. S. at 377, fn. 3. The option, whether exercised or not, might have affected the value of the interest taken by the Government and that is all the Court appears to have meant. Moreover, this Court's decision was handed down on January 8, 1945, and by that date the extent to which the Government's occupancy had thus far been extended from June 30, 1943, would be known to the parties and additional amounts due because of renewals up to that time could be calculated on the remand. General Motors' lease did not expire until May 31, 1948—over three years after this Court's decision—and the Government would have had to exercise its option five successive times in order to extend its occupancy beyond the company's term.

this is not so when the form of taking is for one year with an option to renew (Br. in Opp., pp. 7-8).

a. Even if this were true, it would be irrelevant to the present case, since Westinghouse was not obliged to return to the premises and the Government's occupancy outlasted the term of the lease. By exercising its renewal options in accordance with the condemnation petition, the Government actually took the whole of respondent's lease and removed any duty to fulfill its provisions. Whatever the possibilities when the condemnation petition was first filed in February 1943, and whatever anticipation respondent may then have had that it would have to return, it was certain by May 25, 1944, that the lease would expire before the Government vacated the warehouse (R. 15). And respondent has not even attempted to prove that its removal costs were in any way affected or increased by the initial uncertainty as to its moving back.[6] As the Court has stressed, the fundamental basis for the *General Motors-Petty Motor* rule is that removal costs are allowable only where the re-

---

[6] At the date of taking it was, of course, speculative whether the tenant would have to move back since that depended upon the Government's intentions. Respondent's assertion that while the possibility exists the tenant must seek a new location "mindful of the fact that he is obligated to return to the original premises" (Br. in Opp., p. 4), cannot justify the present judgment since the expenses of removal have no relation to the burden that the existence of this possibility might have thrust upon the tenant. Indeed, as we have said, there is nothing to indicate that the respondent's removal expenses were any greater than they would have been when its lease expired. See *infra*, pp. 23-24, 24-25; *supra*, p. 13.

moval is *temporary*, where the lessee *must* return to the leasehold at the end of the Government's use or at least bear the responsibility for the remainder of the lease term. 323 U. S. at 380, 382, 383; 327 U. S. at 378-380. The rule attempts to adjust to the realities of the tenant's situation and to compensate him for an actual lessening in value of his leasehold attributable to the Government's intervening temporary occupancy. There is no occasion to extend the rule to compensate a tenant whose leasehold might possibly have decreased in value but actually did not do so because the Government's occupancy was—so far as concerns the tenant—neither intervening nor temporary.

b. In any case, it is very doubtful whether respondent's asserted distinction in the effect of the two forms of taking is correct. In reason, it would appear that the result should be the same, whichever form is used to describe what is essentially the same interest. Both formulae make the limit and extent of Government occupancy determinable solely by the Government, and that furnishes very good ground for the view that their effect on existing landlord-tenant relationships is identical.[7] In

[7] Respondent phrases its distinction in terms of freeing the lessee, under the *Petty* formula, from the *obligation* of returning to the premises, but in some cases it may very well be that the tenant would desire to exercise the *privilege* of returning under the old lease terms. If the *Petty* form-of-taking frees the tenant from any further obligation to the leasehold, whatever the actual length of the Government's occupancy, it would probably likewise destroy any rights or privileges under the lease.

his concurring opinion in the *Petty* case (327 U. S. at 381-385), Mr. Justice Rutledge explicitly treated them as identical in effect; his separate expression of views in that case would have been totally unnecessary on respondent's theory.

It is not clear whether the effect of the condemnation of temporary use by the Federal Government upon an existing lease, especially in relation to the obligation of the tenant to return to the premises at the end of the taking, is to be determined by federal or state law.[8] However this may be, we know of only three cases directly bearing on this problem, and none of them throw much light on respondent's claim that the tenant's obligation to resume occupancy of the premises varies with the form of words used in the taking. In *Galvin* v. *Southern Hotel Corporation*, 154 F. 2d 970 (C. A. 4), and *Galvin* v. *Southern Hotel Corporation*, 164 F. 2d 791 (C. A. 4), the issues related solely to distribution of amounts which had been paid by the United States as just compensation for the temporary taking of hotel property and the United States was not concerned with the outcome of the dispute. The second of the cited

[8] The law relating to the rights and obligations of landlords and tenants is, of course, ordinarily determined by the law of the state where the property is located. Cf. *Petty*, 327 U. S. at 376, 381. But it is also well settled that matters which affect the measure of compensation payable by the United States are normally determined by federal law. *United States* v. *Miller*, 317 U. S. 369. Hence, federal principles override special state rules as to the compensation payable to lessees of state school lands. *Nebraska* v. *United States*, 164 F. 2d 866 (C.A. 8), certiorari denied, 334 U. S. 815.

cases held that rights of the lessee were forfeited for violations of its lease as of the date when the United States surrendered possession. In *Leonard* v. *Autocar Sales & Service Co.*, 392 Ill. 182, certiorari denied, 327 U. S. 804, the state court held that a lessee of property of which temporary occupancy was condemned by the United States was obligated to continue to pay rent to his lessor; state law was applied. These cases all involved instances where the description of the interest taken took the form of a term for a year with a right to renew, as in the instant case, but there is nothing in the reasoning of the opinions indicating that the result depended on the form of taking.[9] We doubt whether respondent's distinction exists, but, as we have pointed out, that issue need not be determined here, since the admissibility of evidence of moving costs rests on the fact whether the tenant is actually obligated to return to the premises, and Westinghouse plainly was not.

C. The rule that value of condemned property is to be determined as of the date of taking does not require consideration of respondent's removal.

[9] In the *Leonard* case the court declined to express an opinion as to the results that might follow if the Government extended its occupancy for the entire remaining term of the lease. 392 Ill. at 190. It should be noted that the *Leonard* case cannot aid Westinghouse for the further reason that it was there held that the tenant was obligated to continue to pay rent during the Government's occupancy while the stipulation in the instant case provides that the owner receives the entire rental value except the alleged increment represented by expenses of removal. See *supra*, pp. 3-4, 8.

expenses.—Respondent states that its right to just compensation arose on the date of taking and that "Just compensation is market value on the date of taking not a value to be found by events transpiring at some future date the occurrence of which cannot be foretold on the date of taking" (Br. in Opp., pp. 3-4). But here there is no question of attempting to deprive respondent of a right to compensation which has previously vested. The question is simply one of the evidence which is admissible to determine the amount of compensation. The admissibility of this evidence necessarily depends upon events that in the nature of things could only occur later. In other words, respondent was not vested at the date of taking with an irrevocable right to have moving costs considered, regardless of its actual situation, but rather it might introduce evidence of such costs if it appeared that the exceptional circumstances of the *General Motors* case were present. That prerequisite to admissibility could only be established by actual events which occurred subsequent to the initial taking but pursuant to its provisions. The original condemnation petition (R. 2-3) and declaration of taking (R. 5-6) sanctioned and provided for the renewal options which were later exercised so as to take respondent's entire interest. Thus, at the very outset, it was quite plain that the Government's occupancy might well outlast respondent's lease term, and that consideration of respondent's removal costs would depend, under

the *General Motors-Petty* rule, on the length of the Government's use of the premises.

There is certainly no absolute principle, in eminent domain proceedings, that courts should close their eyes to events occurring after the date of taking, in determining the value of the interest taken as of the time of taking. On the contrary, in *Marion & Rye Valley Ry. Co.* v. *United States,* 270 U. S. 280, where it was held that the wartime temporary taking of the railroad was at most simply a technical taking which did not cause any loss and hence gave no right to recover substantial damages, this Court recognized that evidence of events after the taking could properly be considered. In rejecting a report of a statutory board of referees which had determined upon a substantial award, the Court said (270 U. S. at p. 286):

> No evidence was introduced before it to show that the alleged taking had subjected the company to any pecuniary loss or had deprived it of anything of pecuniary value, although the hearing before the board was commenced long after the period of alleged possession and control had expired.

A similar contention—that facts occurring after the date of taking might not be considered in determining value as of that date—was rejected in *United States* v. *Brooklyn Union Gas Co.,* 168 F. 2d 391, 397 (C. A. 2), the court stating, "It would seem an eerie conclusion that a court must resort

to guess, closing its eyes to reality, when its decision must actually be formulated after the true facts have become available." See Orgel, *Valuation under Eminent Domain*, 1936, sec. 26, p. 88; II Bonbright, *Valuation of Property*, p. 1177; cf. *11,000 Acres of Land in Smith County, Texas* v. *United States*, 152 F. 2d 566 (C. A. 5), certiorari denied, 328 U. S. 835. As Mr. Justice Cardozo pointed out in *Sinclair Rfg. Co.* v. *Jenkins Co.*, 289 U.S. 689, 698, to correct prophecies which must necessarily be uncertain at the valuation-date in the light of later events is to "bring out and expose to light the elements of value that were there from the beginning", rather than to recognize later elements of value non-existent at the critical date. If respondent were to be rigorously governed by its own logic, it would be barred from claiming, as it has, that it actually expended $25,600 in moving (R. 20-21), since the removal occurred after the date of taking.[10] And more importantly, it would be required, on its theory, to evaluate the chance, as of the date of taking, of the Government's exercising the renewal options so as to take the entire term of the lease, before it could even begin to bear its burden of proving loss. If that chance appears great, the lessee's possibility of loss—evaluated prospectively from the date of taking—is obviously small, and at best it would be entitled

[10] In the *General Motors* case, the Court directed the receipt in evidence of "amounts actually and necessarily paid" by the tenant subsequent to the date of taking. 323 U. S. at 383.

to much less than its full removal costs. See also *infra*, pp. 24-25.

Elsewhere in the law of valuation and damages, "experience is [made] available to correct uncertain prophecy" (289 U. S. at 698). Later actual use of a patented device is a legitimate aid to the appraisal of its value at the time of breach of a contract to assign the application for the patent: *Sinclair Rfg. Co.* v. *Jenkins Co.*, 289 U. S. 689, 697-698. In the normal personal injury or breach of contract case, evidence of the actual facts as to damage up to the time of trial is admissible. *United States* v. *Brooklyn Union Gas Co.*, 168 F. 2d 391, 397-398 (C. A. 2); *Sinclair Rfg. Co.* v. *Jenkins Co.*, *supra*, p. 698; McCormick, *Damages*, pp. 299, 303, 323. There is no reason why condemnation cases must be subject to any more uncertain and speculative proof of value.[11]

Any suggestion that evidence of removal expenses is admissible, under the *General Motors-Petty* rule, whenever there is a possibility at the date of taking that the tenant may be required to return to the premises after Government occu-

---

[11] As explained in the *Sinclair Rfg. Co.* case, at 698, *Ithaca Trust Co.* v. *United States*, 279 U. S. 151—holding the value of a life estate to be determined for purposes of the estate tax on the basis of life expectancy at the time of the decedent's death even though the life tenant died before computation and return of the tax—is based on the special intention of Congress "that the computation of the tax should be made as of the death of the testator on the basis of a law of averages." Moreover, valuations for tax purposes present administrative and other problems not present in eminent domain matters. Cf. *Henslee* v. *Union Planters Bank*, 335 U. S. 595.

pancy—no matter how remote that possibility may be under the circumstances of the case—runs counter to the basic rationale of both cases, which emphasizes the tenant's real loss and dislocation. *Supra*, pp. 10-13, 14-16, 17-18. And even on the view that nothing occurring after the taking date can be considered, removal expenses would hardly be a fair or proper measure of the *possibility* that the tenant might have to return since they are also the standard when there is *certainty* that he will have to reassume his lease. Moreover, the decision in the *Petty Motor* case sets this matter at rest, as Chief Judge Magruder points out (R. 41), since it denies admissibility of removal cost evidence even though there was, at the date of taking, a chance that the Government's occupancy might have been cut short. *Supra*, pp. 14, 17-18.

Respondent's only suggestion of a reason why the court should close its eyes to the true facts is its assertion (Br. in Opp., pp. 4-5) that otherwise it would be in a less favorable position than that occupied by a tenant whose case happened to be tried before the option exhausting the term was exercised. But that is surely no reason for allowing consideration of moving expenses when it is known, as here, that the tenant will not have to re-occupy the premises.[12] In *Sinclair Rfg. Co.* v. *Jenkins Co.*, *supra*, at 698, an action for breach of an agreement to assign a patent application, the Court pointed

---

[12] The Government exercised the option which exhausted respondent's lease-term on May 25, 1944 (R. 15). The matter came up for trial in May 1947 (R. 25).

out that if the trial follows quickly after the issuance of the patent, there normally will be no actual experience with the patent to help determine its value, but if the trial does not come for some years, a different situation is presented and actual experience will be available and admissible in evidence. *Mutatis mutandis*, the same is true of the great mass of damage actions.

Moreover, although the question is not presented on the facts of the instant case, it seems clear that the assumption of respondent's argument is erroneous. If at the time the case would ordinarily come up for trial there is doubt whether the Government's occupancy will exceed the tenant's term, no reason appears why the trial could not normally be postponed until the facts were known, or at least the question of removal costs held in abeyance. As the majority opinion below itself suggests (R. 51), an apt analogy is found in the postponement of determination of damages-beyond-ordinary-wear-and-tear for which the Government may be liable until the Government's occupancy ceases, since such damages are not capable of determination in advance.[13] *Kimball Laundry Co.* v. *United States*, 338 U. S. 1; *In re Condemnation of Lands for Military Camp*, 250 Fed. 314 (E. D. Ark.);

[13] In the *General Motors* case it was noted (footnote 3, 323 U. S. at pp. 376-377) that the amended judgment reserved jurisdiction for this purpose.

In cases where the taking prescribes an option to renew, the condemnation proceeding must also, of course, be held open for determination of awards for the extended periods of Government occupancy. Cf. R. 8, 11-19.

United States v. *Certain Parcels of Land in Baltimore*, 55 F. Supp. 257 (D. Md.); cf. *11,0000 Acres of Land in Smith County, Texas* v. *United States*, 152 F. 2d 566, 568, 570 (C.A. 5), certiorari denied, 328 U. S. 835. We know of no rule giving a party a right to have his claim tried before the facts vital to the disposition of that claim can be known.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment below should be reversed.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

A. DEVITT VANECH,
Assistant Attorney General.

OSCAR H. DAVIS,
Special Assistant to the Attorney General.

ROGER P. MARQUIS,
Attorney.

SEPTEMBER, 1949

☆ U. S. GOVERNMENT PRINTING OFFICE 1949 893939 114

IN THE

Supreme Court of the United States

October Term, ~~1948.~~ 1949

No. ~~574.~~ 26

UNITED STATES OF AMERICA,
Petitioner,

v.

WESTINGHOUSE ELECTRIC & MANUFACTURING CO.,
Respondent.

BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MILTON J. DONOVAN,
31 Elm Street,
Springfield, Massachusetts,
Attorney for the Respondent.

LAWYERS' BRIEF & PUBLISHING CO.
BOSTON, MASS.

INDEX.

CITATIONS.

IN THE

Supreme Court of the United States

October Term, 1948.

No. 574.

UNITED STATES OF AMERICA,

Petitioner,

v.

WESTINGHOUSE ELECTRIC & MANUFACTURING CO.,

Respondent.

BRIEF OF THE RESPONDENT

Opinions Below.

The opinion of the District Court (R. 35-37) is reported *sub nom. United States v. Two Parcels of Land*, 71 F. Supp. 1001. The opinions of the Court of Appeals (R. 44-55) are reported in 170 F. 2d 752.

Question Presented.

Whether, when the United States condemns the use of leased property for a term less than the remainder of the lessee's term, with options in the taking to extend from year to year and these options are exercised, (1) after the

taking, (2) after the removal of the tenant, and (3) after the tenant has asserted a claim for compensation, and such exercised options eventually take the entire remainder of the lease, the lessee is entitled to recover the market value of its right to occupy?

Statement of Facts.

The case was presented to the District Court upon a stipulation of agreed facts (R. 28-31).

Briefly this stipulation set forth: that the United States had filed a petition to condemn a property occupied by Westinghouse as a long term tenant; that the condemnation was for the period Feb. 18, 1943-June 30, 1943 "renewable for additional yearly periods . . . at the election of the Secretary of War"; that immediate possession was granted; that the lease of Westinghouse did not expire until October 30, 1944; that the United States subsequently on May 1, 1943 renewed its taking to June 30, 1944, and on May 25, 1944 renewed to June 30, 1945; that the cost to Westinghouse of removing its property was $25,600; that "as of February 18, 1942 the market value of so much of the building in question as was occupied by the Westinghouse Electric Corporation as a lessee, on a sub-lease which would be given by it as a long term tenant to a temporary occupier over and above the rent reserved under its lease was the sum of Twenty Five Thousand Six Hundred and 00/100 Dollars ($25,600.00), being its removal cost to make the property available to the temporary occupier; and that said sum was the value of the occupancy of Westinghouse Electric Corporation under its said lease." The preceding quotation from the stipulation (R. 30) was what it was agreed the testimony of Westinghouse would be at formal

trial, the admissibility of which was not conceded by the Government in the stipulation.

Upon the stipulation the District Court entered a finding in favor of Westinghouse in the sum of Twenty Five Thousand Six Hundred Dollars ($25,600.00) (R. 37) and upon appeal by the Governme t this judgment was affirmed (R. 44).

Westinghouse contends that the judgment was properly entered and submits that the petition for writ of certiorari should be denied.

Argument.

The Finding Below Was Proper.

In ascertaining the just compensation to be paid on condemnation of a right of temporary occupancy of leased space, where the original taking does not exhaust the lease, the value of such occupancy is to be ascertained not by treating the space as empty space to be leased for a long term but by what would be the market rental value of such space on a lease by the long-term lessee to a temporary tenant, as bearing on which the removal costs of the lessee may be shown. *United States v. General Motors Corp.*, 323 U. S. 373, 382-383. This decision it is submitted, is controlling in the instant case.

The United States has argued that because the subsequent exercise of the options in its taking eventually exhausted the term of Westinghouse's lease the *General Motors* case is inapplicable and *United States v. Petty Motor Co.*, 327 U. S. 372 is controlling. The right to just compensation in the instant case as in every such case arose on the date of the taking. Just compensation is mar-

ket value on the date of taking not a value to be found by events transpiring at some future date the occurrence of which cannot be foretold on the date of taking. As of the date of this taking, measured by the then known facts, Westinghouse was under an obligation to the landlord for that portion of the lease not taken; and, as pointed out in the *General Motors* case, because of that continuing obligation the value of the lessee's rights which were taken was affected by the cost of the temporary removal. In the *Petty Motor* case the original taking exhausted the entire terms of all the tenants, the tenants were under no further obligation to the landlord, even though the United States did have the right to surrender the premises during the original term.

Westinghouse contends that the measure of damages should be and are determined by the state of facts existing at the time of the taking; that when the original term taken by the Government carves out only a portion of the lessee's leasehold then the rule of the *General Motors* case applies. The lessee must seek a new location mindful of the fact that he is obligated to return to the original premises when the Government's term expires. In making his future plans such a lessee cannot contemplate that the Government will exercise its options of renewal so as to free him from his continuing obligation to the landlord. To hold that the measure of damages is determined by the state of facts existing at time of trial or at the time the Government quits the premises is to disregard this crucial element which was the basis of the *General Motors* decision. Such a holding could mean that of two tenants in a single building holding identical leases one would be permitted to prove his moving costs as an element of the value of his occupancy because his case happened to be tried before the option exhausting the term was exercised; the other tenant would be barred

from such proof because his case happened to be tried after such option was exercised. It should be observed that in the *General Motors* case the Government's lease was "renewable for additional yearly periods thereafter . . . at the election of the Secretary of War"; so that these such renewals might have eventually exhausted the lease but the Court did not consider this fact as having any bearing upon the measure of damages.

The United States has stated that in the instant case the appellee does not claim the right to be compensated for the rent reserved or that the premises have a rental value in excess of the rent reserved. If by this the Government means that Westinghouse does not claim that the market value of the empty warehouse space was in excess of the price set in these proceedings then the statement is true; however, as pointed out in the above quotation from the stipulation of agreed facts, Westinghouse does not concede that such figure represents the market value of its occupancy at the time of the taking. The market value of Westinghouse's occupancy was the rent reserved plus the sum of $25,600.00, being its removal cost to make the property available to the temporary occupier.

The *General Motors* and the *Petty Motor* cases make a clear distinction: if at the time of the taking the entire term is taken, evidence of removal costs is inadmissible (*Petty Motor* case); if the taking is of only a portion of the leasehold then such evidence is admissible (*General Motors* case). The effect upon the tenant is the basis of this distinction; in the first case he is under no continuing obligation to the landlord, in the second case he is; in the first case his damage is simply the difference in market value of his space as measured by the difference between the market value at the time of the taking and the rent reserved

in his lease; in the second case there is added to this damage the additional element that he must face immediate removal costs and still remain obligated to the landlord for the balance of the term. In such case he must contemplate moving back after the temporary occupier vacates and must therefore expect to face moving costs a second time. A lessee in the second case would not voluntarily sublet for the same price as he would in the first case and therefore the measure of just compensation is not the same as the *General Motors* and *Petty Motor* cases have held.

The position of the United States, it is submitted, confuses "condemnation" and "occupancy". It is the condemnation proceedings that fix the right to damages. In the *General Motors* case the condemnation was for less than the leasehold period; however the Government might have exercised its options so as to exhaust the lease, yet the Court did not hold that the lessee must await the eventual termination of the United States' occupancy before being awarded damages for the taking. The United States in the instant case took only the period from Feb. 18, 1943 to June 30, 1943; that taking fixed the lessee's right to just compensation just as it did in the *General Motors* case regardless of what occupancy the Government later enjoyed through exercising options. On Feb. 18, 1943 Westinghouse had no certainty that it would not have to resume its lease on June 30, 1943. Would the argument of the United States be the same if instead of having two successive options to exercise to exhaust Westinghouse's lease it had made two new takings for the additional terms? Yet that is all that was accomplished by the exercise of the options. It is submitted that the only proof required of the claimant on the point of its being compelled to resume its obligations under the lease was the proof which was stipulated: that the lease did not expire until Oct. 30, 1944 and

the taking was for a period ending June 30, 1943. The value of the lessee's occupancy at the date of the taking is the question in issue, to be determined as the facts then existed.

The lease in question is attached to the stipulation (R. 32-35) and is specifically made a part of it (R. 29). It speaks for itself and is proof that the lessee was bound until October 31, 1944 and would have been compelled to resume its obligations under the lease if the Government had not exercised its options for the two additional yearly periods. In certain instances (R. 33) the lease gave the *lessor* the right to terminate the lease. One of these instances was if "*the estate* hereby created shall be taken . . . by other process of law". However, the estate of the lessee was not taken by the original condemnation proceedings, which is the time when the respondent asserts it suffered damage —only a portion of the estate was then taken. Furthermore there is no showing by the Government (which had the burden to rebut the *prima facie* case of the respondent's obligation to resume its lease obligations made out by the introduction of the lease in the stipulation) that the lessor ever exercised or attempted to exercise any right to terminate the lease. And in fact the lessor never did.

There is a very substantial practical difference between whether the duration of the Government's term depends upon an option to cancel as in the *Petty* case or upon an option to renew as in the instant case. That practical difference is that the *taking* in the *Petty* situation exhausts all of the tenant's term and frees him forthwith from any obligation under his lease; in the *General Motors* case the *taking* did not exhaust the term, nor did it in the instant case. That fact is the precise basis for the special rule of damages propounded by the *General Motors* case. In both

the *Petty* case and the *General Motors* case the Court considered the situation as it existed at the time of the taking, and did not inquire as to whether the options to cancel may have been exercised in the *Petty* case or whether sufficient options to renew might have been exercised in the *General Motors* case to exhaust the term. In fact, as evidenced by the footnote in the *General Motors* decision (at p. 376), the Court considered an option of renewal identical with the one in the instant case, noted that the Court below had retained jurisdiction for the ascertainment of further compensation and said: "We do not understand that these facts alter the question before us. The case now presented involves only the original taking for one year. If on remand, the case be treated as involving the Government's option of renewal, the additional value of that interest must be awarded." This was said by this Court on January 8, 1945; the *General Motors* lease had then but three years to run; it was on that date very probable that the Government might require this space "at the election of the Secretary of War"; yet this Court properly did not consider such facts and decided that the method of taking adopted by the Government required a new rule of damages in order that the tenant's right to just compensation might be preserved. It was a salutary decision and should be preserved. The instant case involves not the extension of the decision but its very preservation. As of the date of the condemnation proceedings the facts in the instant case and in the *General Motors* case were identical: in each there had been a taking of a portion of a long term lease with rights to renew which might in each case exhaust the lease. At the date of trial the facts vary; in the *General Motors* case the options had not yet been exercised, in the instant case they had. In asking this Court to review this case and upset the decision below, the Government is in

effect requesting this Court to approve a method by which the Government may circumvent the rule of this Court in the *General Motors* case by the expedient of delaying trial of condemnation suits and payment of just compensation until such time as it chooses to decide that it no longer wants property it has taken on a year to year basis "at the election of" some individual within the Government. Such a result would be the end of the Fifth Amendment so far as it guarantees just compensation for private property taken by the Government.

Fair, just and reasonable compensation has always been the measure of damages in the condemnation cases, and always that value has been the value as of the time of taking. The *General Motors* decision detecting a method by which the Government might avoid such payment in a case identical to the instant case checked the potential abuse of the power of eminent domain. The United States has here advanced no argument for overruling or circumventing that decision.

Conclusion.

It is, therefore, respectfully submitted that the judgment below was correct and that the petition for writ of certiorari should be denied.

WESTINGHOUSE ELECTRIC CORPORATION,
(formerly WESTINGHOUSE ELECTRIC &
MANUFACTURING CO.)
By MILTON J. DONOVAN,
its Attorney.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 26.

26

UNITED STATES OF AMERICA,
Petitioner,

v.

WESTINGHOUSE ELECTRIC & MANUFACTURING CO.,
Respondent.

BRIEF OF WESTINGHOUSE ELECTRIC & MANUFACTURING CO. (now Westinghouse Electric Corporation).

MILTON J. DONOVAN,
31 Elm Street,
Springfield, Massachusetts,
Attorney for the Respondent.

LAWYERS' BRIEF & PUBLISHING CO.
BOSTON, MASS.

INDEX.

CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 26.

UNITED STATES OF AMERICA,

Petitioner,

v.

WESTINGHOUSE ELECTRIC & MANUFACTURING CO.,

Respondent.

BRIEF OF THE RESPONDENT.

Opinions Below.

The opinion of the District Court (R. 26-28) is reported *sub nom. United States v. Two Parcels of Land*, 71 F. Supp. 1001. The opinions of the Court of Appeals (R. 31-41) are reported in 170 F. 2d 752.

Question Presented.

Whether, when the United States condemns the use of leased property for a term of less than the remainder of the lessee's term, with options in the taking to extend from year to year and these options are exercised, (1) after the

taking, (2) after the removal of the tenant, and (3) after the tenant has asserted a claim for compensation, and such exercised options eventually take the entire remainder of the lease, the lessee is entitled to recover the market value of its right to occupy?

Statement of Facts.

The case was presented to the District Court upon a stipulation of agreed facts (R. 20-22).

Briefly this stipulation set forth: that the United States had filed a petition to condemn a property occupied by Westinghouse as a long term tenant; that the condemnation was for the period Feb. 18, 1943-June 30, 1943 "renewable for additional yearly periods . . . . at the election of the Secretary of War"; that immediate possession was granted; that the lease of Westinghouse did not expire until October 30, 1944; that the United States subsequently on May 1, 1943 renewed its taking to June 30, 1944, and on May 25, 1944 renewed to June 30, 1945; that the cost to Westinghouse of removing its property was $25,600; that "as of February 18, 1942 the market value of so much of the building in question as was occupied by the Westinghouse Electric Corporation as a lessee, on a sub-lease which would be given by its as a long term tenant to a temporary occupier over and above the rent reserved under its lease was the sum of Twenty Five Thousand Six Hundred and 00/100 Dollars ($25,600.00), being its removal cost to make the property available to the temporary occupier; and that said sum was the value of the occupancy of Westinghouse Electric Corporation under its said lease." The preceding quotation from the stipulation (R. 21) was what it was agreed the testimony of Westinghouse would be at formal trial, the admissibility of which was not conceded by the Government in the stipulation.

Upon the stipulation the District Court entered a finding in favor of Westinghouse in the sum of Twenty Five Thousand Six Hundred Dollars ($25,600.00) (R. 25-26) and upon appeal by the Government this judgment was affirmed (R. 31-41).

Westinghouse contends that the judgment was properly entered and should be affirmed.

Argument.

The Finding Below Was Proper.

A. The decision was required by the GENERAL MOTORS case.

In all eminent domain cases the courts are faced with a determination of the meaning of "just compensation" as used in the Fifth Amendment. The concept of market value has evolved as being the test. Therefore when the fee is taken the sovereign must pay the market value of the property taken. The market value of a piece of real estate is not affected by the cost of removal therefrom and this is therefore not an element of damage in such cases, *Bothwell v. United States*, 254 U. S. 231. The only exception the writer knows of to this standard of market value in cases where the fee is taken is where the taking is of public franchises such as streets; there the standard of compensation is not market value but the cost of replacement or of supplying otherwise adequate facilities, *U. S. v. City of New York*, 168 Fed. 2nd 387.

In special types of cases the market value of the property taken includes elements in addition to the market value of the fee in the real estate. Such are the public utility cases where the taking includes a private franchise which the taker is to use, *Omaha v. Omaha Water Co.*, 218

U. S. 189. There, obviously, the franchise is itself property for which just compensation must be paid, and that compensation again is market value.

Where the property taken has been a leasehold interest the market value of the leasehold has been the just compensation found to be due the tenant.

Not until the case of *U. S. v. General Motors Corp.*, 323 U. S. 373, was the court faced with the problem of determining what was just compensation for the taking of a portion of a leasehold interest. There again in arriving at its decision the Court adhered strictly to the standard of market value. In the *General Motors* case in determining the just compensation to be paid on condemnation of a right of temporary occupancy of leased space, where the original taking did not exhaust the lease the court said "the value of such an occupancy is to be ascertained, not by treating what is taken as an empty warehouse to be leased for a long term, but what would be the market rental value of such a building on a lease by a long-term tenant to the temporary occupier", 323 U. S. 373, 382. The court then went on to consider some of the elements which would affect the market price agreed on between the tenant and such a sub-lessee, and held that the reasonable cost of moving out of the premises might be proved as an aid in the determination of such market value.

So in the present case (R. 21) it was agreed by stipulation that witnesses . . . would testify . . . that Westinghouse . . . expended $25,600.00 . . . in moving . . . that said expense was a necessary expenditure . . . was a fair and reasonable sum . . . that on February 18, 1942 the market rental value of . . . the building . . . occupied by Westinghouse . . . as a lessee, on a sublease which would be given by it as long term tenant to a tem-

porary occupier over and above the rent reserved under its lease was . . . $25,600.00, . . . and that said sum was the value of the occupancy of Westinghouse . . . under its said lease.

The evidence, then, here is just what the *General Motors* case says is admissible. Let us look to the taking. The taking was made on February 18, 1943 for a term ending June 30, 1943 with options in the Government to renew for additional yearly periods; the term of Westinghouse did not expire until October 30, 1944 (R. 20). In the *General Motors* case the original taking was for one year and the Government later amended its petition for condemnation so that the taking was renewable for additional yearly periods at the election of the Secretary of War. The factual situation at the time of the taking is then, here, identical with the *General Motors* case.

B. The PETTY MOTOR case does not alter the GENERAL MOTORS decision.

The United States has argued that because the subsequent exercise of the options in its taking eventually exhausted the term of Westinghouse's lease the *General Motors* case is inapplicable and *United States v. Petty Motor Co.*, 327 U. S. 372 is controlling. The right to just compensation in the instant case as in every such case arose on the date of the taking. Just compensation is market value on the date of taking not a value to be found by events transpiring at some future date the occurrence of which cannot be foretold on the date of taking. As of the date of this taking, measured by the then known facts, Westinghouse was under an obligation to the landlord for that portion of the lease not taken; and, as pointed out in the *General Motors* case, because of that continuing obli-

gation the value of the lessee's rights which were taken was affected by the cost of the temporary removal. In the *Petty Motor* case the original taking exhausted the entire terms of all the tenants, the tenants were under no further obligation to the landlord, even though the United States did have the right to surrender the premises during the original term.

Westinghouse contends that the measure of damages should be and is determined by the state of facts existing at the time of the taking; that when the original term taken by the Government carves out only a portion of the lessee's leasehold then the rule of the *General Motors* case applies. The lessee must seek a new location mindful of the fact that he is obligated to return to the original premises when the Government's term expires. In making his future plans such a lessee cannot contemplate that the Government will exercise its options of renewal so as to free him from his continuing obligation to the landlord. To hold that the measure of damages is determined by the state of facts existing at time of trial or at the time the Government quits the premises is to disregard this crucial element which was the basis of the *General Motors* decision. Such a holding could mean that of two tenants in a single building holding identical leases one would be permitted to prove his moving costs as an element of the value of his occupancy because his case happened to be tried before the option exhausting the term was exercised; the other tenant would be barred from such proof because his case happened to be tried after such option was exercised. It should be observed that in the *General Motors* case the Government's lease was "renewable for additional yearly periods thereafter . . . at the election of the Secretary of War"; so that these such renewals might have eventually

exhausted the lease but the Court did not consider this fact as having any bearing upon the measure of damages.

The *General Motors* and the *Petty Motor* cases make a clear distinction: if at the time of the taking the entire term is taken, evidence of removal costs is inadmissible (*Petty Motor* case); if the taking is of only a portion of the leasehold then such evidence is admissible (*General Motors* case). The effect upon the tenant is the basis of this distinction; in the first case he is under no continuing obligation to the landlord, in the second case he is; in the first case his damage is simply the difference in market value of his space as measured by the difference between the market value at the time of the taking and the rent reserved in his lease; in the second case there is added to this damage the additional element that he must face immediate removal costs and still remain obligated to the landlord for the balance of the term. In such case he must contemplate moving back after the temporary occupier vacates and must therefore expect to face moving costs a second time. A lessee in the second case would not voluntarily sublet for the same price as he would in the first case and therefore the measure of just compensation is not the same as the *General Motors* and *Petty Motor* cases have held.

The position of the United States, it is submitted, confuses "condemnation" and "occupancy". It is the condemnation proceedings that fix the right to damages. In the *General Motors* case the condemnation was for less than the leasehold period; however the Government might have exercised its options so as to exhaust the lease, yet the Court did not hold that the lessee must await the eventual termination of the United States' occupancy before being awarded damages for the taking. The United States in the

instant case took only the period from Feb. 18, 1943 to June 30, 1943; that taking fixed the lessee's right to just compensation just as it did in the *General Motors* case regardless of what occupancy the Government later enjoyed through exercising options. On Feb. 18, 1943 Westinghouse had no certainty that it would not have to resume its lease on June 30, 1943. Would the argument of the United States be the same if instead of having two successive options to exercise to exhaust Westinghouse's lease it had made two new takings for the additional terms? Yet that is all that was accomplished by the exercise of the options. It is submitted that the only proof required of the claimant on the point of its being compelled to resume its obligations under the lease was the proof which was stipulated: that the lease did not expire until Oct. 30, 1944 and the taking was for a period ending June 30, 1943. The value of the lessee's occupancy at the date of the taking is the question in issue, to be determined as the facts then existed.

There is a very substantial practical difference between whether the duration of the Government's term depends upon an option to cancel as in the *Petty* case or upon an option to renew as in the instant case. That practical difference is that the *taking* in the *Petty* situation exhausts all of the tenant's term and frees him forthwith from any obligation under his lease; in the *General Motors* case the *taking* did not exhaust the term, nor did it in the instant case. That fact is the precise basis for the special rule of damages propounded by the *General Motors* case. In both the *Petty* case and the *General Motors* case the Court considered the situation as it existed at the time of the taking, and did not inquire *ex* to whether the options to cancel might be exercised in the *Petty* case or whether sufficient options to renew might be exercised in the *General Motors* case to exhaust the term. In fact, as evidenced by the foot-

note in the *General Motors* decision (at p. 376), the Court considered an option of renewal identical with the one in the instant case, noted that the Court below had retained jurisdiction for the ascertainment of further compensation and said: "We do not understand that these facts alter the question before us. The case now presented involves only the original taking for one year. If on remand, the case be treated as involving the Government's option of renewal, the additional value of that interest must be awarded". This was said by this Court on January 8, 1945; the *General Motors* lease had then but three years to run; it was on that date very probable that the Government might require this space "at the election of the Secretary of War"; yet this Court properly did not consider such facts and decided that the method of taking adopted by the Government required a new rule of damages in order that the tenant's right to just compensation might be preserved.

C. Certain Matters of Proof.

The United States in its Brief (Br. of U. S. p. 12) has made certain statements as to proof which may require answer.

The United States has stated that in the instant case the appellee does not claim the right to be compensated for the rent reserved or that the premises have a rental value in excess of the rent reserved. If by this the Government means that Westinghouse does not claim that the market value of the empty warehouse space was in excess of the price set in these proceedings then the statement is true; however, as pointed out in the quotation in the Statement of Facts from the stipulation of agreed facts, Westinghouse does not concede that such figure represents the market value of its occupancy at the time of the taking. The market

value of Westinghouse's occupancy was the rent reserved plus the sum of $25,600.00, being its removal cost to make the property available to the temporary occupier.

The United States has also stated that it was incumbent upon Westinghouse to prove it was obligated to return to the leased premises. The lease in question is attached to the stipulation (R. 22-25) and is specifically made a part of it (R. 20). It speaks for itself and is proof that the lessee was bound until October 31, 1944 and would have been compelled to resume its obligations under the lease if the Government had not exercised its options for the two additional yearly periods. In certain instances (R. 33) the lease gave the *lessor* the right to terminate the lease. One of these instances was if "*the estate* hereby created shall be taken . . . by other process of law." However, the estate of the lessee was not taken by the original condemnation proceedings, which is the time when the respondent asserts it suffered damage—only a portion of the estate was then taken. Furthermore there is no showing by the Government (which had the burden to rebut the *prima facie* case of the respondent's obligation to resume its lease obligations made out by the introduction of the lease in the stipulation) that the lessor ever exercised or attempted to exercise any right to terminate the lease. And in fact the lessor never did.

D. The authorities cited by the United States do not warrant the consideration of events subsequent to the taking.

The United States takes the position (Br. of U. S. p. 21) that the admissibility of evidence as to moving costs "necessarily depends upon events that in the nature of things could only occur later." Westinghouse has shown above that no such consideration was resorted to in the *General*

Motors case which factually was identical with this. The United States attempts to give judicial sanction to its assumption by citation of authorities.

The decision in *Marion & Rye Valley Railway Co. v. U. S.*, 270 U. S. 280 (Br. of U. S. p. 22) goes no further than to declare that the Railway had the burden of proving damage and had not sustained the burden when it failed to show any interference with its management, control or operation. There was in fact no real taking in this case, nothing for which just compensation was due. It is not authority for the assumption made by the United States.

Sinclair Refining Company v. Jenkins Co., 289 U. S. 689 (Br. of U. S. p. 23) is not an eminent domain case. In actions of tort for personal injury and other types of cases Westinghouse admits that evidence of damage sustained subsequent to and flowing from the tortious act are admissible; but such has never been the rule in eminent domain cases. In the *Sinclair* case where the value of a patent was in issue the market value test failed because it might relieve the tort feasor of responsibility for its wrong; the court therefore admitted evidence of the use to which the patent was put as "a legitimate aid to the appraisal of the value of the patent at the time of the breach". The court merely allows the uncertain prophesy of the appraisal to be corrected by evidence of experience.

United States v. Certain Parcels of Land in Baltimore, 55 F. Supp. 257 (Br. of the U. S. p. 27) goes no further than to hold that the court will retain jurisdiction for the purpose of determining future damage that may occur to the taken premises which, of course, was not ascertainable at the time of the taking. This the court does to *protect the landowner*, after he has received just compensation for

the property temporarily taken, for any damage which the taker may do to such property before returning it to the landowner. To the same effect is *In re Condemnation of Lands for Military Camp*, 250 Fed. 314 (Br. of U. S. p. 26).

11,000 Acres of Land v. U. S., 152 Fed. 2nd 566 (Br. of U. S. p. 23) is authority not for the assumption of the United States but rather for the two contentions of Westinghouse that (a) market value is the test of just compensation, and (b) the value at the time of the taking is what is considered. In arriving at the value of a gas and oil lease the court held that the damage for *each year's taking* was to be arrived at by finding the difference between the market value of the lease prior to each taking and the market value following each year of the taking.

The case of *U. S. v. Brooklyn Union Gas Co.*, 168 Fed. 2nd 391 (Br. of U. S. p. 22) presents a very different problem from the case in issue. In that case streets were taken in fee including all rights and easements, as a result this taking included the condemnation of gas and electric franchises. There is no readily ascertainable market value for public utility franchises and for this reason their valuation in eminent domain proceedings has always presented problems different from those involving the taking of other forms of property, see Orgel, *Valuation under Eminent Domain*, 1936, Sect. 26. This case recognizes such differences, the court saying (at p. 395) "a franchise must be valued * * * upon what as a matter of business judgment would be considered its worth, if not on sale, at least as a producer of earnings", and (at p. 396) "the standard method of valuing a franchise is on the basis of its earnings, past as well as prospective * * * a valuation of expected profits * * * tends to be a capitalization merely of hopes", and (at p. 397) "the value at the time of taking

must be developed, in default of a sale price, largely from a consideration of past earnings and such showing of prospective earning power as can be made. Hence deductions on conclusions as to future productivity not only must be made, but are an important element in a case of this kind". The court then goes on to hold that actual happenings following the taking are admissible "to support or check the assumed prospects". In other words the court recognizes that it is attempting to evaluate an intangible, that even the most honest expert opinion in such a case is merely an informed guess, and that therefore facts subsequent to the taking should be admitted to justify or correct this guess. But it is submitted that only in cases that involve the taking of utility franchises has this novel rule of evidence found support. In this respect it is interesting to note that in *Kimball Laundry Company v. United States*, 338 U. S. 1 where the court very recently was seeking to define methods of determining the valuation of another type of intangible —the value of trade routes, or good-will value—the court never once suggests the introduction of evidence of what actually happened to the trade route in question, although at the time of the hearing the government's user had ceased. The court suggests only methods of computation which experts, cognizant of and using the facts existing and known at the time of the taking, might employ to fix a market value for the trade routes; in other words it fits the case into the well-known market value formula, and makes no suggestion of extending the method used in utility franchise cases as indicated by the *Brooklyn Union Gas* case, even though the *Kimball* case involved the valuation of an intangible much more analogous to a franchise than to a leasehold or other form of tangible property.

Conclusion.

Westinghouse, therefore, contends that neither by resort to precedent nor to its own logic has the United States differentiated this case from the *General Motors* case. The decision in that case was a salutary one and should be preserved. This case involves not the extension of the *General Motors* decision, but its very preservation. As of the date of the taking the facts in the instant case and in the *General Motors* case were identical: in each there had been a taking of a portion of a long term lease with rights to renew which might exhaust the lease. At the date of trial the facts vary; in the *General Motors* case sufficient options to exhaust the term of the lease had not yet been exercised, in the present case they had. In asking this court to upset the decision below the United States is in effect requesting the approval of a method by which it may circumvent the *General Motors* decision by the expedient of delaying trial of condemnation suits and payments of just compensation until such time as it chooses to decide that it no longer wants property it has taken on a year to year basis "at the election of" some individual within the Government. Such a result would be the end of the Fifth Amendment so far as it guarantees just compensation for private property taken by the United States.

Fair, just and reasonable compensation has always been the measure of damages in condemnation cases, and always that value has been the value as of the time of taking. The *General Motors* decision detecting a method by which the United States might avoid such payment in a case identical with the instant case checked the potential abuse of the power of eminent domain. The United States has here advanced no argument for overruling or circumventing that decision.

It is, therefore, respectfully submitted that the judgment below was correct and should be affirmed.

WESTINGHOUSE ELECTRIC CORPORATION,
(formerly WESTINGHOUSE ELECTRIC & MANUFACTURING CO.)

By MILTON J. DONOVAN,
Its Attorney.